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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 605

AMERICAN PROPELLER AND MANUFACTURING COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 605

AMERICAN PROPELLER AND MANUFACTURING COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. B-28

AMERICAN PROPELLER AND MANUFACTURING COMPANY, a Corp.

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On February 25, 1922, the plaintiff filed its original petition.

On April 27, 1922, the defendant filed a general traverse to said petition.

On September 4, 1926, the defendant, by leave of court, filed a counterclaim.

On November 12, 1927, the defendant, by leave of court, filed an amended counterclaim.

On October 9, 1931, by leave of court, the plaintiff filed a replication to said counterclaim.

On May 7, 1935, the plaintiff, by leave of court, filed an amended petition, which is as follows:

II. AMENDED PETITION—Filed May 7, 1935

To the Honorable, The Chief Justice, and Associate Judges of the Court of Claims:

Your petitioner, American Propeller and Manufacturing Company, respectfully represents:

1. That your petitioner is a corporation duly incorporated under the laws of the State of Maryland and having its principal place of business in the City of Baltimore, State of Maryland. It is the sole owner of the hereinafter set forth claims; no assignment or transfer of said claims, or of any part thereof, or interest therein, has been made; your petitioner is justly entitled to the amount hereinafter claimed from the United States after allowing all just

credits and offsets as hereinafter set forth; and your petitioner has not in any way voluntarily aided, abetted or given encouragement to rebellion against the government of the United States.

[fol. 2] 2. That during the emergency arising from the declaration of war with the German Empire, and prior to November 12th, 1918, your petitioner entered into the following contracts with an officer acting under the authority, direction or instruction of the Secretary of War:

Date of contract	Contracting party	Contract number	Order number
Sept. 25, 1917	Signal Corps, U. S. A.	1,750	20,005
Oct. 6, 1917	Signal Corps, U. S. A.	1,846	A-20,054
Mar. 25, 1918	Signal Corps, U. S. A.	3,347	20,859
Mar. 25, 1918	Signal Corps, U. S. A.	3,349	20,860
May 16, 1918	Signal Corps, U. S. A.	DO-3,870	DO-21,128

Copies of which contracts and of the orders upon which they are based, are filed herewith and marked respectively, Exhibit Contract No. 1, 2, 3, 4 and 5.

3. That during the emergency aforesaid and prior to November 12, 1918, to wit, in the month of December, 1917, while the claimant was engaged in carrying out the contracts of September 25th, 1917, and October 6th, 1917, above referred to, and certain other similar contracts which have been fully carried out and fulfilled, and to this end your petitioner was constructing a one-story concrete building to facilitate the work necessary to be performed under said contracts, your petitioner received instructions from Lieutenant (later Captain) E. L. Ryerson, Jr., representing the Propeller Section of the United States Signal Corps, that it would be necessary for your petitioner to make preparation for a much larger production of aircraft propellers than was called for by the then existing contracts between your petitioner and the United States of America, and your petitioner was directed by the said Lieutenant E. L. Ryerson, Jr., acting for the Propeller Section of the United States Signal Corps, as aforesaid, to add another story to said concrete building and to secure and install such other equipment and material as would be required to manufac-
[fol. 3] ture said additional aircraft propellers, which said equipment and material consisted of twenty Cutler Kilns

for the drying of lumber, sundry duplicating and hubbing machines, glue spreaders, two Selden motor trucks, and large quantities of lumber, together with various other equipment and material which had to be secured in order that your petitioner would be prepared to manufacture said additional aircraft propellers as directed.

4. That said instructions and directions for the construction of said additional story to said building and to secure the material and install the additional equipment, necessary to manufacture said additional aircraft propellers did not constitute an agreement executed in the manner prescribed by law, but said instructions and directions were given and received in good faith for purposes connected with the prosecution of the war, and your petitioner, in compliance with said instructions and directions, had constructed said additional story to said building and had secured said material and installed said equipment upon the faith of said instructions and directions, prior to November 12th, 1918.

5. That said instructions and directions were verbal, given personally to Spencer Heath, the President of your petitioner company by the said Lieutenant E. L. Ryerson, Jr., an officer of the United States Army, acting for and under the authority of the Secretary of War, and your petitioner believes it could not lawfully have refused to comply with said instructions and directions.

6. That during the emergency aforesaid, and prior to March 11, 1918, on or about February 15th, 1918, your petitioner received a verbal order from Lieutenant (later Captain) E. L. Ryerson, Jr., representing the Propeller Section of the United States Signal Corps, for seven hundred and fifty (750) combat propellers for the Liberty motor, and on, to wit, the 25th day of February, 1918, this order was increased from seven hundred and fifty (750) to one thou- [fol. 4] sand (1,000) propellers, and your petitioner through its President, Spencer Heath, entered into a verbal agreement with the said Lieutenant E. L. Ryerson, Jr., to manufacture and deliver the said combat propellers for the Liberty motor as aforesaid and immediately proceeded to manufacture and produce said combat propellers in fulfillment of said verbal order as aforesaid.

7. That on, to wit, the 13th day of March, 1918, your petitioner received instructions from the said Lieutenant E. L.

Ryerson, Jr., acting for the Propeller Section of the United States Signal Corps, as aforesaid, to stop all work on the one thousand (1,000) combat propellers for the Liberty motor theretofore ordered, as aforesaid, which said instructions were contained in a telegram from the said Lieutenant E. L. Ryerson, Jr., as follows:

"Cleveland, O., 1918, Mar. 13, P. M., 6.20.

American Propeller and Mfg. Co., 233 East Hamburg St., Baltimore, Md.

Discontinue manufacturing combat blocks. Can you substitute at once Hispano propellers eight foot six diameter, five and twenty-two hundredths pitch, ten laminations, hub nine inches diameter seven inches thick. Material oak. Drawing going special delivery tonight. What is earliest date delivery can commence? No copper tips.

Lieut. Ryerson."

And the next day the said Lieut. E. L. Ryerson, Jr., wrote to your petitioner as follows:

"Propeller Section, War Department

Cleveland Branch, Equipment Division, Signal Corps,

1936 Euclid Avenue, Cleveland, Ohio

March 14th, 1918.

ELR:CWD.

From: Production Department.
To: The American Propeller Company, Baltimore, Md.
Subject: Blocks for Combat Propellers.

1. We find that we have never confirmed our understanding with you that you were to proceed with the gluing up of [fol. 5] blocks for use on combat propellers as per arrangements made with Lieutenant Ryerson.

2. This agreement incorporated the use of wideners and splices where necessary in the construction of these blocks for combat propellers. It was understood that mahogany or oak would be used, mahogany being given the preference and used as far as possible with the stock available.

3. The arrangement was made with the understanding that you were to produce 750 combat propellers in March,

provided final information with regard to pitch and design could be obtained in sufficient time to permit the finishing of these blocks within the time specified.

4. It was originally understood that these blocks would be built up so as to be finished in accordance with your own Dynopter type design as per sample being sent to Dayton for tests. It was later agreed that the blocks would be so changed as to permit the finishing of propellers up to 10′ diameter and with pitch and other dimensions to be determined by later tests, provided such dimensions could be applied in the construction of these blocks.

5. You will furnish us, upon receipt of this an accurate statement of the status of this matter, indicating the number of blocks in process, the number that can be applied on 10′ diameter blades, as well as the number that must be applied on blades of the Dynopter type design.

6. It is understood that this procedure was adopted as an emergency measure in order to make possible the production of combat propellers with as great rapidity as possible in spite of the fact that no approved design could be furnished for the execution of a contract in a regular manner.

7. It was understood that as soon as tests could be made to determine the proper pitch and design that could be applied on these blocks that negotiations would be entered into for the purchase of a number of completed propellers represented by the blocks which you have constructed for this purpose."

By direction of the Chief Signal Officer,
(Sgd.) E. L. Ryerson, Jr., Lieutenant Signal Corps."

[fol. 6] 8. That at the time of receiving said instructions from the said Lieutenant Ryerson as aforesaid, to stop all work on the said one thousand (1,000) combat propellers, your petitioner had already done much work towards the construction of said propellers.

9. That on, to wit, the 29th day of August, 1918, your petitioner received from the Contract Department of the Bureau of Aircraft Production a confirming order No. 720376 for one hundred and eighty-four (184) combat pro-

pellers for the Liberty motor. Accompanying said order was a proposed contract No. 4578 bearing date the 29th day of August, 1918, duly executed on behalf of the United States of America by F. D. Schnacke, Captain A. S. A. P., which said proposed contract was not executed by your petitioner because the terms and conditions therein contained were unsatisfactory to your petitioner, as said contract embodied specifications materially different from the specifications under the order of February 15th, 1918, and work had already been performed by your petitioner upon a large number of said combat propellers under said order of February 15th, 1918, in accordance with the specifications originally given your petitioner. Copies of said proposed contract of August 29th, 1918, and of the confirming order upon which it was based, are filed herewith, marked Exhibit Contract No. 6.

10. That the said order for the manufacture of seven hundred and fifty combat propellers for the Liberty motor of February 15th, 1918, as increased to one thousand (1,000) propellers by the order of February 25th, 1918, and as recognized and confirmed by said letter of March 14th, 1918, and order of August 26th, 1918, as aforesaid, did not constitute an agreement executed in the manner prescribed by law, but said agreement on the part of your petitioner to manufacture said combat propellers was entered into in good faith for the purposes connected with the prosecution of the war and your petitioner had performed said agreement in part and had made expenditures and incurred obli-
[fol. 7] gations upon the faith thereof prior to November 12th, 1918; that said order for said combat propellers, except so far as confirmed by said order of August 26th, 1918, was a verbal order given personally to your petitioner through its President, Spencer Heath, by the said Lieutenant E. L. Ryerson, Jr., an officer of the United States Army, acting for and under the authority of the Secretary of War, and your petitioner believes it could not lawfully have refused to comply with said order.

11. That prior to November 11th, 1918, to wit, in the summer and fall of 1918, your petitioner, through Spencer Heath, its President, had several conferences with the duly authorized officers and representatives of the Bureau of Aircraft Production of the War Department relative to

the difficulties that had been interposed by the officers and representatives of the said Bureau of Aircraft Production to the full and prompt completion of the contracts and orders received by your petitioner, as above set forth, and thereafter, to wit, on the 13th day of November, 1918, as a result of said conferences and of a conference held on that date, a verbal proposition was made by the said Bureau of Aircraft Production to your petitioner as set forth in a letter from your petitioner to the said Bureau of Aircraft Production, dated November 14th, 1918, as follows:

"November 14, 1918.

Bureau of Aircraft Production, Washington, D. C.

Attention Mr. W. C. Potter

GENTLEMEN:

Referring to the conference at your office yesterday in regard to this Company's uncompleted contracts, we wish to confirm our understanding of the verbal proposition made to us and our attorneys by you after separate conference with Lieut. Col. Downey. We understand your proposition to be as follows:

The item of $10,200 on order #21128 for Charavay Propellers, last shipped, is to be deferred pending advice to you from your Engineering Department as to whether these [fol. 8] propellers embody any departure of design which would render them less serviceable for use than propellers as to which no departure from the design is alleged.

As to all completed and uncompleted work on orders other than the item on No. 21128, above referred to, we understand that it is your proposition that we shall be paid for all work as it now stands on a basis of cost of materials, all direct and indirect labor costs, all overhead charges direct and indirect covering the entire period since the beginning of work on the material and 10% profit on the costs so obtained except upon the cost of any material used in connection with the work which was supplied by the Government and not paid for by us.

Very truly yours, American Propeller & Mfg. Co.

(Sgd.) Spencer Heath, President.

SH:NCL."

And thereafter, to wit, on the 19th day of November, 1918, the said Bureau of Aircraft Production sent to your petitioner in reply to its said letter of November 14th, 1918, a letter stating that said letter of November 14th, 1918, correctly set forth the proposition made by the said Bureau of Aircraft Production to your petitioner, which said letter of November 19th, 1918, is as follows:

"War Department, Bureau of Aircraft Production,
Washington

November 19, 1918.

From: Office, Director of Aircraft Production.
To: American Propeller & Mfg. Co., Baltimore, Md.
Subject: Propeller Contracts.

1. This will acknowledge receipt of your communication of the 14th instant in which you confirm your understanding of verbal proposition made to you by Mr. Potter and the undersigned at our recent conference.

2. Your letter is in exact accord with the arrangements made at said conference and is confirmed subject to the one qualification that the overhead shall be the proportionate part of the overhead properly chargeable to the work being done with the Bureau of Aircraft Production.

By direction of the Director of Aircraft Production,
(Signed) A. C. Downey, Lieutenant-Colonel, A. S. A. P."

[fol. 9] And thereafter, to wit, on the 22nd day of November, 1918, your petitioner wrote a letter to the Bureau of Aircraft Production accepting the proposition made as aforesaid on the 13th day of November, 1918, and set out in the said letter of November 14th, 1918, which said letter is as follows:

"November 22, 1918.

Director of Aircraft Production,
Washington, D. C.

Attention Lieut. Colonel A. C. Downey, Contract Dept.

DEAR SIR:

Replying to your letter of the 19th inst., we beg to advise that we have decided to accept the verbal proposition of Mr.

Potter, as confirmed by us in our letter of the 14th inst., and your acknowledgment as above.

Very truly yours, American Propeller & Mfg. Co.,
(Sgd.) Spencer Heath, President.

SH/NCL."

And thereafter, to wit, on the 25th day of November, 1918, your petitioner wrote a letter to the Bureau of Aircraft Production calling attention to an omission of certain words from its letter of November 14th, 1918, which said letter is as follows:

"November 25, 1918.

Director of Aircraft Production,

Washington, D. C.

Attention Lieut. Colonel A. C. Downey, Contract Dept.

DEAR SIR:

Referring to our letter of November 22nd, accepting Mr. Potter's proposition for payment for work done on our various contracts, we wish to confirm our understanding that the provisions in the third paragraph in our letter of November 14th are intended to apply to all completed and uncompleted work except the item of $10,200.00 mentioned in the second paragraph in our letter of November 14th.

In the second line of the third paragraph of our letter of the 14th, after the word 'than', the words 'the Item on' were omitted by us inadvertently.

Very truly yours, American Propeller Mfg. Co.,
(Sgd.) Spencer Heath, President.

SH/NCL."

[fol. 10] And thereupon the said A. C. Downey, Lieutenant-Colonel A. S. A. P., on behalf of the Director of Aircraft Production endorsed upon said letter of November 25th, 1918, the following:

"O. K."

and attached his signature, A. C. Downey, thereto.

12. That prior to the understanding and agreement referred to in Section 11 of this petition, as above set forth, your petitioner had been prevented from completing and

shipping the propellers called for by the orders and contracts and informal orders above set forth by stop and suspension orders received from time to time from the War Department and by reason of the interference of the officers and representatives of the Bureau of Aircraft Production of the War Department, and the failure of said officers and representatives to make proper and prompt inspections and to give shipping orders to your petitioner. That, notwithstanding the interference and obstructions thus interposed by said officers and representatives of the Bureau of Aircraft Production of the War Department, your petitioner maintained production at all times ahead of inspection, and was at all times ready, willing and able to carry said contracts and informal orders to completion according to its agreements with the said officers and representatives of the Bureau of Aircraft Production of the War Department as aforesaid.

13. That in obedience to the orders aforesaid and the action of the said officers and representatives of the Bureau of Aircraft Production of the War Department, above referred to, your petitioner was compelled to cease the production of propellers under the contracts and informal orders above set forth, and your petitioner has been unable to secure an adjustment of its claim under the understanding and agreement set forth above in paragraph 11 of this petition, or otherwise, all to the great loss and damage of your petitioner.

[fol. 11] 14. That prior to June 30, 1919, your petitioner filed with the Secretary of War under the Provisions of the Act of March 2nd, 1919, Public Number 322, 65th Congress, as well as under the general laws of the United States relative thereto, its claim growing out of the above mentioned contracts and informal orders, which said claim was originally made out as of February 28th, 1919, for the sum of $449,113.47, and said claim, after your petitioner had been able to make a careful examination and a more accurate estimate of its losses, was subsequently amended as of the date of June 21, 1920, wherein the claim of your petitioner was set forth as amounting to $498,866.43 as of that date, with additional charges for certain continuing expenses, which expenses could not be terminated until the final adjustment of the claim.

15. That thereafter, to wit, on July 10th, 1920, the Aircraft Service Section of the War Department Claims Board rendered an award allowing the claim of your petitioner in the sum of $181,467.66, from which award your petitioner duly took an appeal, and thereafter, on, to wit, the 13th day of April, 1921, the War Department Claims Board, Appeal Section, made an award in favor of your petitioner for a total amount not definitely stated in dollars and cents, but by the the terms of which your petitioner would have been entitled to a sum of approximately $180,000.00.

From this decision your petitioner duly appealed to the Secretary of War and on the 7th day of May, 1921, the Secretary of War affirmed the said decision of the War Department Claims Board, Appeal Section, and on May 12, 1921, your petitioner was notified that it must accept the said award of the War Department Claims Board, Appeal Section, within ten days or it would be denied all relief in the premises, but your petitioner was unwilling to accept said award because said award was grossly inadequate and unfair, and thereafter, to wit, on the 27th day of May, 1921, your petitioner was notified by the War Department Claims [fol. 12] Board, Appeal Section, that, by direction of the Assistant Secretary of War, a final order had been entered by the War Department, denying your petitioner all relief in the premises.

16. Your petitioner further represents that by reason of the premises as set forth above in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13, your petitioner has incurred expenses and suffered loss and damage as follows:

Description	Amount
For finished and partly finished propellers, laminations, veneers and cut copper tips	$153,065.37
For walnut lumber removed by the War Department in August, 1919, together with certain storage, kiln drying, dressing, insurance and inventory expenses	147,295.36
For packing boxes, purchased especially for shipment of propellers, together with insurance and storage charges thereon	7,443.90
For cancellation of contract of July 19, 1918, with Security Storage and Trust Company for packing airplane propellers	1,896.79

Description		Amount
For sheet copper and copper rivets, especially purchased for tipping propellers, together with insurance thereon		1,698.28
For continuing overhead expenses from date of discontinuance of manufacture to date of termination of contracts		84,365.41
For storage of propellers, laminations and veneers, together with insurance thereon, including hauling and handling of propellers, etc., and services of watchmen		6,905.58
For loss resulting from erection of second story and office floors of claimant's Key Highway Plant and from installing additional special equipment therein		34,306.55
For repairs, alterations, additions and betterments to leased premises:		
Grindall Street Plant	$14,542.03	
Hamburg Street Plant	2,294.06	
Kunkel Street Plant	305.97	
		17,142.06
Amt. Carried Fwd.		$454.119.30
[fol. 13] Amt. Brought Fwd.		$454,119.30
For additional machinery and equipment built by claimant or purchased especially for the purpose of expediting production		26,020.72
For Cutler Curtain Kilns, especially purchased and installed for War Department work		20,939.16
For dies especially made for cutting copper tips for propellers manufactured for War Department work		936.94
For clamps in excess of normal requirements especially purchased for War Department work		4,548.10
For motor trucks in excess of normal requirements especially purchased for War Department work		2,611.98
For boiler plant especially purchased and installed for expediting War Department work		5,388.33
		$514,564.53

Description	Amount
That said expenses, loss and damage above set forth are in addition to the sum of $10,200.00 due the petitioner as hereinafter set forth in paragraph 17 of this petition.	
17. Your petitioner further represents that there is justly due your petitioner by the United States War Department the sum of $10,200.00 for 102 propellers of the Charavay design as called for in Order No. 21128, referred to in the letter of November 14, 1918, above set forth, which said 102 propellers were duly inspected and accepted by the United States War Department and were delivered by your petitioner to the U. S. Expedition Depot, Canton, Baltimore, Maryland. Your petitioner further represents that the Engineering Department of the Bureau of Aircraft Production of the United States War Department has determined that the said 102 propellers did not embody any departure from design which might render them less serviceable for use than propellers as to which no departure from design is alleged.	
For 102 propellers of the Charavay design, delivered under Order No. 21128 (Contract No. Do 3870)	10,200.00
Amt. Carried Fwd.	$524,764.53
[fol. 14] Amt. Brought Fwd.	$524,764.53
18. Your petitioner further represents that in addition to the claims above set forth there is justly due your petitioner by the United States War Department sums aggregating $57,364.51 for propellers, windwheels, express charges and freight, engineering and development services, for work performed before cancellation of special order for propellers and for adjustment of cancelled contract for windwheels; for all of which bills have been duly presented and approved, but payments thereof	

Description		Amount	Amount
withheld by reason of the claim of the U. S. War Department for lumber as hereinafter set forth; and that the items of said sums due as aforesaid are as follows:			
1917.			
Aug. 13.	Order 8233—Express charges on 15 propellers, shipped to Mt. Clements, Michigan	$43.54	
Aug. 13.	Order 8233—Express charges on 15 propellers, shipped to Fairfield, Ohio	38.48	
Dec. 1.	Order 20006—Freight charges on 2 propellers, shipped to Fort Sill, Oklahoma	11.19	
Dec. 7.	Order 20006—Four propellers shipped to Fort Sill, Oklahoma	508.24	
Dec. 19.	Order 20052—Six propellers shipped to Hampton, Virginia	525.90	
1918.			
Jan. 21.	Order 20005—One propeller reshipped by Copper Products Co. to Curtis Aeroplane Co., Hammondsport, N. Y.	87.65	
Feb. 16.	Order 3257—Three propellers shipped to East Pittsburgh, Pa.	186.00	
Feb. 28.	Order 6514—15.2% work accomplished before cancellation of order for 30-3 blade propellers for 90 H. P. Hall-Scott Engine	375.00	
	Amts. Carried Fwd.	$1,776.00	$524,764.53

[fol. 15] Amts. Brought Fwd.	$1,776.00	$524,764.53
1918.		
Mar. 7. Order 20619—Express charges on 12 propellers, shipped to Dayton, Ohio	25.68	
Mar. 26. Order 20054—36 Propellers Serial Nos. 12429-12464	3,155.40	
Apr. 24. Order 20054—50 Propellers shipped to Fort Worth, Texas	4,382.50	
Apr. 27. Order 20858—1 Propeller shipped to Hampton, Virginia	95.00	
May 19. Order 20859—6 Propellers shipped to Fort Sill, Okla.	762.00	
July 10. Order 43173—75 Windwheels shipped to New York City	900.00	
Aug. 3. Order 43173—50 Windwheels shipped to New York City	600.00	
Aug. 13. Order 43173—220 Windwheels shipped to New York City	2,640.00	
Aug. 13. Order 43173—30 Windwheels shipped to Alcott, Texas	360.00	
Oct. 29. Order 5015—Services in development of Metal Propellers	207.70	
1919.		
Feb. 13. Order 130255—Engineering services tool equipment and material for regulating air fans	497.80	
	$15,402.08	
Order 520069—Contract 7117—36—two-blade Propellers, delivered and accepted at $89.00 each	3,204.00	

For payment due under settlement Contract No. S. C. 4301 A, dated December 19, 1918, for adjustment for Windwheels manufactured under Order No. 740,026	38,758.43	
		57,364.51
Total		$582,129.04

19. Your petitioner further represents that by reason of the claims above set forth there is due your petitioner the aggregate sum of $582,129.04, but that as an offset to said [fols. 16-17] sum due your petitioner as aforesaid there is due by your petitioner to the United States War Department the sum of $437,891.01 for lumber furnished to your petitioner by the United States War Department, and that there is justly due your petitioner after allowing all just credits and offsets, the sum of One Hundred Forty-four Thousand, Two Hundred Thirty-eight and 03/100 Dollars ($144,238.03), for which sum your petitioner asks judgment against The United States.

American Propeller & Manufacturing Co., by Spencer Heath, President. J. Kemp Bartlett, Attorney for Petitioner; Bartlett, Poe & Claggett, Baltimore, Maryland; Williams, Myers and Quiggle, Washington, D. C., of Counsel.

Duly sworn to by Spencer Heath. Jurat omitted in printing.

[fol. 18] EXHIBIT No. 1

Signal Corps, United States Army

Contract No. 1750.
Order No. 20005.
Proposal No. Q4785.
Req. No. A-3023.

These Articles of Agreement entered into this twenty-fifth day of September, nineteen hundred and seventeen between A. C. Downey, Captain of Signal Corps, United States Reserves, of the first part, and American Propeller

& Mfg. Co., a corporation, with an office at 233-249 E. Hamburg Street, in the City of Baltimore, State of Maryland, of the second part, Witnesseth, That in conformity with the advertisement, specifications, and proposal referred to in the order quoted below, and which, in so far as they relate to this contract, form a part of it, the said A. C. Downey, Captain, Signal Corps Reserves, for, and in behalf of the United States of America, and the said American Propeller & Mfg. Co. (hereinafter designated as the contractor) do covenant and agree, to and with each other, as follows, viz.:

Article I. That the said contractor shall furnish to the United States of America, the material described in Order No. 20005, copy herewith, which is hereby made a part of this contract.

Article II. That the deliveries of the supplies and materials herein contracted for shall be made in the manner, numbers, or quantities specified in the order.

Article III. All supplies and materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the Chief Signal Officer, United States Army, as to quality and quantity shall be final.

[fol. 19] Article IV. That for and in consideration of the faithful performance of the stipulations of this contract, the contractor shall be paid at the office of the party of the first part for all supplies and materials delivered in conformity with the requirements of this contract, on or before the dates specified and accepted, the prices stipulated in aforementioned order making a total consideration of eighty-seven thousand, six hundred fifty dollars ($87,650.00), to be paid as soon as practicable after the acceptance of the same, in funds furnished by the United States for the purpose.

Article V. In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the said party of the first part may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency

by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the United States of having the articles or equipment completed; (d) or may permit the party of the second part to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as provided in the attached order.

Article VI. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the supplies and materials and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective articles or supplies or to require the fulfillment of any of the terms of the contract.

Article VII. The contractor further agrees to hold and save the United States harmless from and against all and [fol. 20] every demand or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Article VIII. Neither this contract nor any interest herein shall be transferred to any other party, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said contractor are reserved to the United States.

Article IX. No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom. But this stipulation, so far as it relates to members or delegates to Congress, is not to be construed to extend to this contract.

Article X. It is expressly agreed and understood that this contract shall be non-effective until an appropriation

adequate to its fulfillment is made by Congress and is available.

Article XI. That this contract shall be subject to approval of the Chief Signal Officer, United States Army.

In Witness Whereof, the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

John L. Carey as to
Henen L. Haslup as to
Mary J. Snipe as to
Genevieve L. Whiteford as to

A. C. Downey,
Signal Corps, U. S. R.
American Propeller & Mfg. Co.
Spencer Heath, President.

Approved October 1, 1917. By authority of the Chief Signal Officer.

Authorization of July 11, 1917.

Brice P. Wayne, Lieut. Col., Signal Corps.

R. A-3023 $87,650.00 Ne Order No. A 20005.

[fol. 21] War Department

Office of Chief Signal Officer

Washington, September 21, 1917.

From: Office Chief Signal Officer.
To: American Propeller & Mfg. Co., 233 E. Hamburg St., Baltimore, Md.
Subject: Order for propellers.

In accordance with your quotation of August 17, 1917 (1 Q. R. 4785 HSW), I am directed by the Chief Signal Officer of the Army to place order with you for the articles listed below.

Inspection. Goods must be ready for inspection at your factory within * * * see note * * * days after receipt of order. When ready for inspection notify Signal Corps Inspector, Airplane and Airplane Engines, at your factory.

Items accepted should be packed for domestic shipment and furnished F. O. B. factory.

Forward at Government Expense. Apply for Bill of Lading to Depot Quartermaster, U. S. A., 2620 Gray's Ferry Road, Philadelphia, Pa., stating order number, weight and marking of packages, and in case of export

shipments the value and cubical dimensions. List consignment upon Form 27 (shippers' receipt) inclosed herewith, obtain quartermaster's signature thereto and forward with your bill.

Bill upon forms 330A and 29 inclosed herewith, observing carefully the instructions on the reverse side of form 330A.

Shipping Instructions and Marking:

Marked: "Order 20005 Aero."

Shipping Instructions Will Be Furnished You Later.

[fol. 22] Item:

1. 1,000 propellers, for Curtiss OX-5 engines, oak (to be tipped with copper and including box) as per propeller specifications 11,000, 11,001, 14,000, 15,002A, 15,018A, 16,001, 16,002, 20,500, 20,505, 21,000, 21,001, 29,500, 29,501, 29,502A, 29,503A, 29,505, 29,506, 29,507A, 29,508, 29,509, sketches 35 and 36, and figures 1, 2, 3, and 4, at $87.65 each —$87,650.00.

NOTE.—Early shipment is urgent, therefore please apply for Government Bill of Lading ten days in advance of the date upon which goods will be ready to go forward. However, do not make shipment until goods are inspected and accepted. Arrange for inspection in ample time to avoid any delay in delivery. It is necessary that delivery requirements be observed. You are required to notify the Equipment Division at least two weeks in advance if you are unable to deliver as stipulated.

Deliveries to be 20 per day commencing September 10, 1917, to parties designated by the Equipment Division of the Signal Corps.

Above propellers to be serially numbered 6754 to 7753 inclusive, the number to be preceded by the letters "S. C." App. LASC 18 (201).

A. C. Downey, Captain, Signal Corps, U. S. R.

Contract No. 1750 Will Follow.

EXHIBIT No. 2.

Signal Corps, United States Army

Contract No. 1846.
Order No. 20054.
Proposal No. —.
Req. No. 3631.

These Articles of Agreement entered into this sixth day of October, nineteen hundred and seventeen, between A. C. [fol. 23] Downey, Captain, Signal Corps, United States Reserves, of the first part, and American Propeller & Mfg. Co., a corporation with an office at 233 E. Hamburg St., in the City of Baltimore, State of Maryland, of the second part, Witnesseth that in conformity with the advertisement, specifications, and proposal referred to in the order quoted below, and which, so far as they relate to this contract, form a part of it, the said A. C. Downey, Captain, Signal Corps, United States Reserves, for and in behalf of the United States of America, and the said American Propeller & Mfg. Co. (hereinafter designated as the contractor) do covenant and agree, to and with each other, as follows, viz.:

Article I. That the said contractor shall furnish to the United States of America, the material described in Order No. 20054, copy herewith, which is hereby made a part of this contract.

Art. II. That the deliveries of the supplies and materials herein contracted for shall be made in the manner, numbers, or quantities specified in the order.

Art. III. All supplies and materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the Chief Signal Officer, United States Army, as to quality and quantity shall be final.

Art. IV. That for and in consideration of the faithful performance of the stipulations of this contract, the contractor shall be paid at the office of the party of the first part for all supplies and materials delivered in conformity with the

requirements of this contract, on or before the dates specified and accepted, the price stipulated in aforementioned order making a total consideration of one hundred and seventy-five thousand three hundred dollars ($175,300.00) to be paid as soon as practicable after the acceptance of the same, in funds furnished by the United States for the purpose.

[fol. 24] Art. V. In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the said party of the first part may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the United States of having the articles or equipment completed; (d) or may permit the party of the second part to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as provided in the attached order.

Art. VI. The contractor further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Art. VIII. Neither this contract nor any interest herein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by said contractor are reserved to the United States.

Art. IX. No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract or to any benefit which may arise therefrom. But this stipulation, so far as it relates to mem-

bers or delegates to Congress, is not to be construed to extend to this contract.

Art. X. That it is expressly agreed and understood that this contract shall be non-effective until an appropriation adequate to its fulfillment is made by Congress and is available.

[fol. 25] Art. XI. That this contract shall be subject to approval of the Chief Signal Officer, United States Army.

In Witness Whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

Charles O. DeVore as to
John L. Cary as to
Mary J. Snipe as to
Genevieve L. Whiteford as to

A. C. Downey,
Captain, Signal Corps, U. S. R.
American Propeller & Mfg. Co.,
Spencer Heath, President.

Approved October 18, 1917. By authorization of the Chief Signal Officer.

Authorization of July 11, 1917.

C. A. Scoaney, Lieut. Col., Signal Corps

R. A-3631 $175,300.00 Order No. A-20054

War Department

Office of Chief Signal Officer

Washington, October 4, 1917.

From: Office Chief Signal Officer.
To: American Propeller & Mfg. Co., 233 E. Hamburg St., Baltimore, Md.
Subject: Order for propellers.

In accordance with prices quoted in your letter to cover Purchase Request dated September 26, I am directed by the Chief Signal Officer of the Army to place order with you for the articles listed below (HSW).

[fol. 26] Inspection. Goods must be ready for inspection at your factory within * * * see note * * * days after receipt of order. When ready for inspection notify Signal Corps Inspector, at your factory.

Items accepted should be packed for domestic shipment and furnished F. O. B. factory.

Forward at Government Expense. Apply for Bill of Lading to Depot Quartermaster, U. S. A., 2620 Gray's Ferry Road, Philadelphia, Pa., stating order number, weight, and marking of packages, and in case of export shipment the value and cubical dimensions. List consignment upon Form 27 (shipper's receipt) inclosed herewith, obtain quartermaster's signature thereto and forward with your bill.

Bill upon forms 330A and 29 inclosed herewith, observing carefully the instructions on the reverse side of form 330A.

Shipping Instructions and Marking:

Marked: "Order 20054 Aero."

Shipping Instructions Will Be Furnished You Later.

Item:

1. 1,000 propellers, oak, to be tipped with copper, including box, for Curtiss OX-5 engine, at $87.65 each—$87,650.00.

2. 1,000 propellers, oak, to be tipped with copper, including box, for Hall-Scott, A-7-A engine, at $87.65 each—$87,650.00. Total, $175,300.00.

NOTE.—Early shipment is urgent, therefore please apply for Government Bill of Lading ten days in advance of the date upon which goods will be ready to go forward. However, do not make shipment until goods are inspected and accepted. Arrange for inspection in ample time to avoid any delay in delivery.

Above propellers are to be made in accordance with Specifications Nos. 11,000, 11001, 14,000, 15,018-A, 16,001, 16,002, 20,500, 21,001, 29,500, 29,501, 29,502-A, 29,503-A, 29,504-A, 29,505, 29,507-A, 29,508, 29,509, 20,505, 15,002-A and 15,022-A.

[fol. 27] Delivery of item 1 to be at the rate of 125 per month beginning November 1, 1917; delivery of item 2 to be at the rate of 125 per month beginning November 1, 1917, to parties to be designated by the Equipment Division of the Signal Corps. It is absolutely necessary that delivery requirements be carefully observed; and you are required to notify the Equipment Division of the Signal Corps at least two weeks in advance if you contemplate being unable to deliver as stipulated.

Item 1 to be serially numbered 12266 to 13265 inclusive; item 2 to be serially numbered 13,266 to 14,265 inclusive, the serial number to be preceded by the letters "S. C."

A. C. Downey, Captain, Signal Corps, U. S. R.

EXHIBIT No. 3

Signal Corps, United States Army

Contract No. 3347.
Order No. 20859.
Proposal HSW.
Req. No. A-10276.

These articles of Agreement entered into this twenty-fifth day of March, nineteen hundred and eighteen, between F. D. Schnacke, 1st Lieut. A. S. Sig. R. C., of the first part, and American Propeller & Mfg. Co., a corporation, with an office in the City of Baltimore, in the County of Baltimore, State of Maryland, of the second part, Witnesseth, That in conformity with the advertisement, specifications, and proposal referred to in the order quoted below, and which, in so far as they relate to this contract form a part of it, the said F. D. Schnacke, for and in behalf of the United States of America, and the said American Propeller & Mfg. Co. (here-[fol. 28] inafter designated as the contractor) do covenant and agree, to and with each other, as follows, viz.:

Article I. That the said contractor shall furnish to the United States of America, the material described in Order No. 20859, copy herewith, which is hereby made a part of this contract.

Art. II. That the deliveries of the supplies and materials herein contracted for shall be made in the manner, numbers, or quantities specified in the order.

Art. III. All supplies and materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The deci-

sion of the Chief Signal Officer, United States Army, as to quality and quantity shall be final.

Art. IV. That for and in consideration of the faithful performance of the stipulations of this contract, the contractor shall be paid at the office of the party of the first part for all supplies and materials delivered in conformity with the requirements of this contract, on or before the dates specified and accepted, the prices stipulated in aforementioned order making a total consideration of twelve thousand seven hundred dollars ($12,700.00) to be paid as soon as practicable after the acceptance of the same, in funds furnished by the United States for the purpose.

Art. V. In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the said party of the first part may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which [fol. 29] shall be the difference between the contract price and the cost to the United States of having the articles of equipment completed; (d) or may permit the party of the second part to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as provided in the attached order.

Art. VI. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for all of the supplies and materials and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective articles or supplies or to require the fulfillment of any of the terms of the contract.

Art. VII. The contractor further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Art. VIII. Neither this contract nor any interest herein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee, but all right of action for any breach of this contract by said contractor are reserved to the United States.

Art. IX. No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom. But this stipulation so far as it relates to members of or delegates to Congress is not to be construed to extend to this contract.

Art. X. That it is expressly agreed and understood that this contract shall be non-effective until an appropriation adequate to its fulfillment is made by Congress and is available.

Art. XI. That this contract shall be subject to approval of the Chief Signal Officer, United States Army.

[fol. 30] In Witness Whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

Agnes Murphy as to
Kittie M. Shands as to

F. D. Schnacke,
1st Lieut. A. S. Sig. R. C.

Genevieve L. Whiteford as to
M. Carolyn Moran as to

American Propeller & Mfg. Co.,
Spencer Heath, President.

Approved-April 9, 1918. By authority of the Chief Signal Officer.

Authorization of July 11, 1917.

A. C. Downey, Major Signal Corps.

R. A-10276.
Propeller.

Lbc.
$12,700.00

Order No. 20859.

War Department

Office of Chief Signal Corps Officer

Washington, March 22, 1918.

From: Office Chief Signal Officer.
To: American Propeller & Mfg. Co., Baltimore, Md.
Subject: Order for propellers.

In accordance with agreement between your company and the Propeller Section, Equipment Division, this office (HSW) I am directed by the Chief Signal Officer of the Army to place order with you for the articles listed below.

Inspection. Goods must be ready for inspection at your factory within * * * see note * * * days after receipt of order. When ready for inspection notify Signal Corps Inspector at your factory.

[fol. 31] Items accepted should be packed for domestic shipment and furnished F. O. B. factory, Baltimore, Md.

Forward on Government Bill of Lading, which will be sent you by the Traffic Branch, Signal Corps, 359 Union Terminal, Washington, D. C. See instructions on reverse side.

Immediately after shipment the consignment should be listed in detail, the original copy of Form 27 (shippers' receipt) and one Carbon copy on Form 27A (shipping notice) and these lists forwarded to the Traffic Branch, Signal Corps, 359 Union Terminal, Washington, D. C., accompanied by memorandum copy of bill of lading.

Bill upon forms 330A and 29 enclosed herewith, observing carefully the instructions on the reverse side of Form 330A.

Shipping Instructions and Marking:
Shipping Instructions Will be Furnished You Later.
Marked: "Order No. 20859 Aero."

Item:

1. 100 propellers, copper tipped, for Curtiss V-2, Type 3, on R-4 Airplanes, to be serially numbered 62723 to 62822 inclusive, the numbers to be preceded by the letters "S. C." at $127.00 each—$12,700.00.

Note.—Propellers to be constructed in accordance with Signal Corps Specifications No. 29500-C with the exception

of Paragraph 25 in said specifications: to be made of oak and similar to those furnished under Order No. 20247.

Price as quoted to include copper tipping and boxing for shipment.

Delivery to begin April 1st, 1918, and the entire order to be completed by May 1, 1918.

It is important that delivery schedule be maintained and that Shipping Instructions to be issued later be followed absolutely.

Raw materials and process material, in addition to the finished product is subject to Signal Corps Inspection.

F. D. Schnacke, 1st Lieut., A. S. Sig. R. C.

[fol. 32] EXHIBIT No. 4

Signal Corps, United States Army

Contract No. 3349.
Order No. 20860.
Proposal No. HSW.
Req. No. A-10275.

These Articles of Agreement entered into this twenty-fifth day of March, nineteen hundred and eighteen, between F. D. Schnacke, 1st Lieut. A. S. Sig. R. C., of the first part, and American Propeller & Mfg. Co., a corporation, with an office in the City of Baltimore, State of Maryland, of the second part, Witnesseth, That in conformity with the advertisement, specifications, and proposal referred to in the order quoted below, and which in so far as they relate to this contract, form a part of it, the said F. D. Schnacke, for and in behalf of the United States of America, and the said American Propeller & Mfg. Co. (hereinafter designated as the contractor) do covenant and agree, to and with each other, as follows, viz.:

Article I. That the said contractor shall furnish to the United States of America, the material described in order No. 20860, copy herewith, which is hereby made a part of this contract.

Art. II. That the deliveries of the supplies and materials herein contracted for shall be made in the manner, numbers, or quantities specified in the order.

Art. III. All supplies and materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector on the part of the Government and such as do not conform to the specifications set forth in this contract shall be rejected. The de- [fol. 33] cision of the Chief Signal Officer, United States Army, as to quality and quantity, shall be final.

Art. IV. That for and in consideration of the faithful performance of the stipulations of this contract, the contractor shall be paid at the office of the party of the first part for all supplies and materials delivered in conformity with the requirements of this contract on or before the dates specified and accepted, the prices stipulated in aforementioned order making a total consideration of thirty-eight thousand dollars ($38,000.00) to be paid as soon as practicable after the acceptance of the same, in funds furnished by the United States for the purpose.

Art. V. In the event of the failure of said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the said party of the first part may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the United States of having the articles or equipment completed; (d) or may permit the party of the second part to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as provided in the attached order.

Art. VI. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the supplies and materials and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver or the right of the party of the first part to reject any defective articles or supplies or to require the fulfillment of any of the terms of the contract.

Art. VII. The contractor further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on ac- [fol. 34] count of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Art. VIII. Neither this contract nor any interest herein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said contractor are reserved to the United States.

Art. IX. No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom. But this stipulation so far as it relates to members of or delegates to Congress is not to be construed to extend to this contract.

Art. X. That it is expressly agreed and understood that this contract shall be non-effective until an appropriation adequate to its fulfillment is made by Congress and is available.

Art. XI. That this contract shall be subject to approval of the Chief Signal Officer, United States Army.

In Witness Whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

Agnes Murphy as to
Kittie M. Shands as to
Genevieve L. Whiteford as to
M. Carolyn Moran as to

F. D. Schnacke,
1st Lieut. A. S. Sig. R. C.
American Propeller & Mfg. Co.
Spencer Heath, President.

Approved April 8, 1918. By authority of the Chief Signal Officer.

Authorization of July 11, 1917.

A. C. Downey, Major, Signal Corps.

$38,000.00 McD Order No. 20860
R. A-10275.
Propeller.

[fol. 35] War Department

Office of Chief Signal Officer

Washington, March 23, 1918.

From: Office Chief Signal Officer.
To: American Propeller & Mfg. Co., Baltimore, Md.
Subject: Order for propellers.

In accordance with agreement between your company and the propeller section, I am directed by the Chief Signal Officer of Army to place order with you for the articles listed below (HSW).

Inspection. Goods must be ready for inspection at your factory in six weeks after receipt of order. When ready for inspection notify Senior Inspector, Signal Corps, at your factory.

Items inspected should be packed for domestic shipment and furnished F. O. B. factory, Baltimore, Md.

Forward on Government Bill of Lading which will be sent by the Traffic Branch, Signal Corps, 359 Union Terminal, Washington, D. C. See instructions on reverse side.

Immediately after shipment the consignment should be listed in detail, the original copy of Form 27 (shippers' receipt) and one carbon copy of Form 27A (shipping notice) and these lists forwarded to the Traffic Bureau, Signal Corps, 359 Union Terminal, Washington, D. C., accompanied by memorandum copy of bill of lading.

Bill upon forms 330A and 29 inclosed herewith, observing carefully the instructions on the reverse side of form 330A.

Shipping Instructions and Marking:
Shipping Instructions Will Be Furnished Later.
Marked: "Order No. 20860, Aero."

Items:

1. 500 propellers for Curtiss OX-5 engines, to be tipped [fol. 36] with copper, to be constructed in accordance with Signal Corps specifications Nos. 29500-C, 20,500-A, 14,000-A, 21,001-B, 15,002-B and in accordance with American Propeller design No. 150 as especially amended by the Production Engineering Department; to be made of oak in accordance with Signal Corps Specifications No. 15,029-A, at $76.00 each—$38,000.00.

NOTES.—The amount of each propeller ($76.00) covers cost of copper tip, and box for shipment.

It is important that the delivery schedule be maintained or exceeded, and that shipping instructions be followed absolutely.

These propellers are to be serially numbered from 63123 to 63622, inclusive, the numbers to be preceded by the letters "S. C.".

Raw Material and process material, in addition to the finished product is subject to Signal Corps inspection.

F. D. Schnacke, 1st Lieut. A. S. Sig. R. C.

Contract No. 3349 will follow.

EXHIBIT No. 5

Signal Corps, United States Army

Contract No. Do-3870.
Order No. Do-21128.
Proposal No. —.
Req. No. B-996.

These Articles of Agreement, entered into this sixteenth day of May, nineteen hundred and eighteen, between F. D. Schnacke, 1st Lieut. A. S. Sig. R. C., of the first part, and American Propeller Company, a corporation, with an office in the City of Baltimore, State of Maryland, of the sec- [fol. 37] ond part, Witnesseth, That in conformity with the advertisement, specifications, and proposals referred to in the order quoted below, and which in so far as they relate to this contract, form a part of it, the said F. D. Schnacke, Signal Corps, United States Army, for and in behalf of the United States of America, and the said American Propeller Company (hereinafter designated as the contractor) do covenant and agree, to and with each other, as follows, viz.:

Article I. That the said contractor shall furnish to the United States of America, the material described in Order No. Do-21128, copy herewith, which is hereby made a part of this contract.

Art. II. That the deliveries of the supplies and materials herein contracted for shall be made in the manner, numbers, or quantities specified in the order.

Art. III. All supplies and materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the Chief Signal Officer, United States Army, as to quality and quantity shall be final.

Art. IV. That for and in consideration of the faithful performance of this contract, the contractor shall be paid at the office of the party of the first part for all supplies and materials delivered in conformity with the requirements of this contract, on or before the date specified and accepted, the prices stipulated in aforementioned order making a total consideration of three hundred thousand dollars ($300,000.00) to be paid as soon as practicable after the acceptance of the same, in funds furnished by the United States for the purpose.

Art. V. In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the said party of the first part may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency in the open mar-[fol. 38] ket or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the United States of having the articles or equipment completed; (d) or may permit the party of the second part to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as provided in attached order.

Art. VI. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the supplies and materials and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first

part to reject any defective articles or supplies or to require the fulfillment of any of the terms of the contract.

Art. VII. The contractor further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Art. VIII. Neither this contract nor any interest herein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said contractor are reserved to the United States.

Art. IX. No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom. But this stipulation so far as it relates to Members or Delegates to Congress is not to be construed to extend to this contract.

[fol. 39] Art. X. That it is expressly agreed and understood that this contract shall be non-effective until an appropriation adequate to its fulfillment is made by Congress and is available.

Art. XI. That this contract shall be subject to approval of the Chief Signal Officer, United States Army.

In Witness Whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

Alexandria E. Olsen as to
Mabelle Olson as to
Genevieve L. Whiteford as to
M. Carolyn Moran as to

F. D. Schnacke.
1st Lieut. A. S. Sig. R. C.
American Propeller & Mfg. Co.
Spencer Heath, President.

Approved May 22, 1918, by authority of the Chief Signal Officer, authorization of July 11, 1917.

A. C. Downey, Major, Signal Corps.

R. B-996 $30,000.00 Order No. Do-21128
PL 4. Director, Pur.

War Department

Office of Chief Signal Officer

Washington, May 14, 1918.

From: Office, Chief Signal Officer.
To: American Propeller Company, Baltimore, Md.
Subject: Order for propellers.

In accordance with prices agreed upon at conference with the Equipment Division (HSW) I am directed by the Chief [fol. 40] Signal Officer of the Army to place order with you for the articles listed below.

Inspection: Goods must be ready for inspection at your factory within—see note—days after receipt of order. When ready for inspection notify with attached Form 26a the departments designated, sending Inspection Department's copy to 136 K St., N. E., Washington, D. C., and District Manager of Equipment's copy to Grand Central Palace Building, Lexington Ave. and 46th St., New York, N. Y.

Items accepted should be packed for domestic shipment and furnished F. O. B. cars, point of origin (see note).

Forward on Government bill of lading which will be sent you by the Traffic Branch, Signal Corps, 359 Union Terminal, Washington, D. C. See instructions on reverse side.

Immediately after shipment the consignment should be listed in detail, the original copy of Form 27 (shipper's receipt) and one carbon copy on Form 27A (shipping notice) and these lists forwarded to the Traffic Branch, Signal Corps, 359 Union Terminal, Washington, D. C., accompanied by memorandum copy of bill of lading.

Bill upon Forms 330A and 29 inclosed herewith, observing carefully the instruction on the reverse side of Form 330A.

Shipping Instructions and Markings:
Marked: "Order Do-21128, Aero."
Shipping instructions will be furnished later.

Item:

1. 3,000 propellers for U. S. 12 engines, without tips to be constructed in accordance with Signal Corps specifications Nos. 29,500C, 20,500, 14,000A, 21,001B, 15,022B, 15,002B, and in accordance with the design of Mr. Fred-

erick Charavay and known as the Charavay Design, to be made of walnut, graded in accordance with Signal Corps specifications, at $100.00 each, $300,000.00.

NOTE.—Propellers to be serially numbered 67060 to 70059, inclusive, each number to be preceded by the letters "S. C."

[fol. 41] In addition to the finished article, raw material and process material are subject to inspection at source of production.

Contract Do-3870 will follow.

NOTE.—Delivery to begin June 15 and continue at the rate of 40 propellers per day. Order to be completed by September 15.

Propellers to be packed in four or six propeller box, at our option.

Please notify the Inspection Equipment Division, Signal Corps, 136 K St., N. E., Washington, D. C., and the Traffic Branch, S. C., 359 Union Terminal, Washington, D. C., immediately of the exact point from which shipment will be made.

F. D. Schnacke, First Lieut. A. S. Sig. R. C.

EXHIBIT No. 6

Bureau of Aircraft Production

Contract No. 4578.
Order No. 720376.
Proposal No. (HSW).
Req. No. B-5593.

This contract, made this twenty-ninth day of August, nineteen hundred and eighteen, between the United States of America, party of the first part, hereinafter called the "Government," represented by F. D. Schnacke, Captain A. S. A. P., U. S. Army, and American Propeller Company, a corporation, with an office in the City of Baltimore, State of Maryland, party of the second part, hereinafter called the "Contractor," Witnesseth, that in conformity with the advertisement, specifications, and proposal referred to in the order quoted below, and which, in so far as they relate

to this contract, form a part of it, the said parties do covenant and agree with each other, as follows, viz.:

[fol. 42] Article I. That the said contractor shall furnish the Government the material described in Order No. 720376, copy herewith, which, together with all authorized amendments thereto, is hereby made a part of this contract.

Art. II. That the deliveries of the supplies and materials herein contracted for shall be made in the manner, numbers or quantities specified in the order.

Art. III. All supplies and materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the Director of Aircraft Production as to quality and quantity shall be final. Until final inspection and acceptance of, and payment for, all of the supplies and material and work herein provided for, no prior inspection, payment or act is to be construed as a waiver of the right of the Government to reject any defective articles or supplies or to require the fulfillment of any of the terms of the contract.

Art. IV. That for and in consideration of the faithful performance of the stipulations of this contract, the contractor shall be paid at the office of the party of the first part for all supplies and materials delivered in conformity with the requirements of this contract on or before the dates specified, and accepted, the prices stipulated in aforementioned order, making a total consideration of twenty-seven thousand six hundred dollars ($27,600.00) to be paid as soon as practicable after the acceptance of the same, in funds furnished by the Government for the purpose.

Art. V. In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the Government may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase [fol. 43] price and the original contract price; (c) may take over from the contractor any or all items completed or in

process of manufacture, payment for which shall be the difference between the contract price and the cost to the Government of having the article or equipment completed; (d) or may permit the contractor to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as and if provided in the attached order.

Art. VI. The contractor further agrees to hold and save the Government harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Art. VII. Neither this contract nor any interest herein shall be transferred to any other party or parties, and in case of such transfer the Government may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said contractor are reserved to the Government.

Art. VIII. No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States is, or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom. But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract.

Art. IX. The contractor expressly warrants that it has employed no third person to solicit or obtain this contract on its behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by it hereunder; and that it has not, in estimating the contract price demanded [fol. 44] by it, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to it hereunder are free from obligation to any other person for services rendered, or supposed to have been rendered, in the procurement of this contract. The con-

tractor further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the Government and that the Government may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid, or agreed to be paid.

Art. X. That it is expressly agreed and understood that this contract shall be non-effective until an appropriation adequate to its fulfillment is made by Congress and is available.

Art. XI. That this contract shall be subject to approval of the Director of Aircraft Production or of any person designated by him.

In Witness Whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

United States of America.

Witnesses:
Irene Handley as to
May E. L. Gallagher as to

By F. D. Schnacke,
Captain, A. S. A. P.

$27,600.00
R B—5593.
PL—47.

Order No. 720376

[fol. 45] War Department

Bureau of Aircraft Production

Washington, August 26, 1918.

From: Office Director of Aircraft Production.
To: American Propeller Company, Baltimore, Md.
Subject: Order for propellers.

In accordance with the terms of order (HSW) I am directed by the Director of the Bureau of Aircraft Production to place order with you for the articles listed below:

Inspection: Goods must be ready for inspection at your factory within—see note—days after receipt of order. When ready for inspection notify with attached form 26A, the designated department, sending original copy to Inspection Department, Production Division, Bureau of Aircraft Production, 4½ St. and Missouri Ave., N. W., Washington, D. C.

Items accepted should be packed for domestic shipment and furnished F. O. B. Baltimore, Md.

Forward on Government bill of lading which will be sent you by the Traffic Section, Bureau of Aircraft Production, 119 D Street, N. E., Washington, D. C. See instructions on reverse side.

Immediately after shipment the consignment should be listed in detail, the original copy of Form 27 (shipper's receipt) and one carbon copy of Form 27A (shipping notice), and these lists forwarded to the Traffic Section, Bureau of Aircraft Production, 119 D St., N. E., Washington, D. C., accompanied by memorandum, copy of bill of lading.

Bill upon Forms 330A and 29 inclosed herewith, observing carefully the instructions on the reverse side of Form 330A.

Shipping Instructions and Marking:

Marked: "Order No. 720376 Aero."

Shipping instructions will follow later.

[fol. 46] Item:

1. 184 propellers for DH4 planes with U.S.-12 engines to be manufactured from quartered white oak, specifications Nos. 15,029A, or from mahogany specifications No. 15,028A. These propellers to be constructed according to your drawing No. 154 in accordance with Bureau of Aircraft Specifications Nos. 20,500A, 20,504A, 20,505A, 15,002C, 15,022C, 29,500C, 29,510, 14,000A, 14,008, 14,001C, 10,020B.

These propellers to be boxed in single boxes in accordance with specifications No. 29,500C for domestic shipment, at $150.00 per propeller, including individual boxes for shipment, $27,600.00.

NOTE.—The above propellers are to be serially numbered from 79422 to 74605, inclusive, and serial numbers to be preceded by "S. C."

Delivery of the above to be completed by October 1, 1918.

Contract No. 4578 will follow.

For combat purposes.

F. D. Schnacke, Captain, A. S. A. P.

III. GENERAL TRAVERSE—Filed May 13, 1935

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the

plaintiff herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Frank J. Wideman, Assistant Attorney General.

[fol: 47] IV. Amended Counterclaim—Filed November 12, 1927

Now comes the defendant, by the Assistant Attorney General, and by leave of court first had and obtained, files its amended counterclaim herein as follows:

At the time of the filing of the petition herein, February 25, 1922, the plaintiff was and still is indebted to the defendant by reason of income taxes duly assessed and unpaid as follows:

On August 19, 1920, the Commissioner of Internal Revenue made an additional assessment of income taxes against the plaintiff for the year 1919 in the amount of $1,231.96. On September 2, 1920, the Commissioner of Internal Revenue made an additional assessment of income taxes against the plaintiff for the year 1917 in the amount of $18,280.48. Plaintiff was duly notified of such assessment and said taxes have not been paid.

[fol. 48] Subsequent to the filing of the petition herein, and on the date shown later, the plaintiff became and still is indebted to the defendant by reason of income taxes duly assessed and unpaid as follows:

In the year 1923, the Commissioner of Internal Revenue made an additional assessment of income taxes against the plaintiff for the year 1917 in the amount of $1,964.37. This assessment appeared on the 1923 list No. March 105–A. In the year 1924 the Commissioner of Internal Revenue made an additional assessment of income taxes against the plaintiff for the year 1918 in the amount of $191,403.77. This assessment appears on the 1924 list No. June OOSCL. No. 6. The plaintiff was duly notified of such assessment and said taxes have not been paid.

Wherefore, the defendant prays judgment against the plaintiff in the amount of $212,870.58, with interest.

Respectfully, Herman J. Galloway, Assistant Attorney General. George H. Foster, Attorney.

[fol. 49] V. Replication—Filed October 9, 1931

Now comes the plaintiff, by its attorney, and by leave of court first had and obtained, files its replication to the amended counterclaim herein as follows:

(1) Plaintiff denies that it is indebted to the defendant for income taxes for the years 1917, 1918 and 1919 in the amounts alleged by the defendant in its said amended counterclaim filed herein, or in any amount whatever.

(2) The plaintiff alleges that the claim or claims for taxes alleged in the original counterclaim and/or in the amended counterclaim in this cause and/or the collections thereof, was or were barred by statute prior to or at the time the said original counterclaim and/or the said amended counterclaim was or were filed in this cause.

Wherefore, Plaintiff prays that the defendant's amended counterclaim be dismissed.

J. Kemp Bartlett, Williams, Myers and Quiggle, Attorneys for Plaintiff.

Duly sworn to by Spencer Heath. Jurat omitted in printing.

[fol. 50] VI. Argument and Submission of Case

On February 3, 1936, this case was argued and submitted on merits by Mr. J. Kemp Bartlett, for plaintiff, and by Mr. George H. Foster, for the defendant.

VII. Further History of Proceedings

On April 6, 1936, the court filed findings of fact, conclusion of law with an opinion by Green, J., and entered judgment in favor of the plaintiff for the sum of $16,254.96.

On June 2, 1936, the plaintiff filed a motion for new trial.

On June 5, 1936, the defendant filed a motion for new trial.

On October 5, 1936, the court entered the following order on said motions:

VIII. Order Entered October 5, 1936

Now on this fifth day of October, 1936, the motions of plaintiff and defendant to set aside the judgment, grant a new trial, and objections to the findings having been fully submitted, it is found by the court that the judgment should be set aside by reason of the computation of plaintiff's tax not having been made in accordance with the determination in the opinion of plaintiff's net income and invested capital. Upon recomputation, it is ordered and adjudged by the court that the conclusion of law and the judgment hereto-[fol. 51] fore entered be and the same are hereby set aside; and in lieu thereof it is ordered and adjudged by the court that the defendant do have and recover of and from the plaintiff the sum of twenty-one thousand eight hundred ninety-five dollars and eighty-nine cents ($21,895.89) with interest as provided by law from April 6, 1936, being the date when the former judgment was entered. Judgment is further rendered against the plaintiff in favor of the defendant for the cost of printing the record in this case.

It is further ordered that in all other respects the motions and objections of both plaintiff and defendant be overruled.

The court, on its own motion, orders that the following changes and additions be made to the findings:

The last sentence of subdivision (1) of Finding 41, pertaining to walnut lumber, will be stricken out and in lieu thereof the following will be inserted—

The Commissioner valued the walnut lumber on hand at the time of the closing inventory at cost, which was $108,-477.98 greater than the market value.

To subdivision (6) of Finding 41, after the words "Their value January 1, 1918, depreciated from $107,100, was $68,154.45", the following will be added:

At the time of their acquisition, the patents were worth the par value of the stock so issued.

It is further ordered by the court that the last finding (42) be stricken out as pertaining to a claim and issue now abandoned.

By the court.

[fol. 52] IX. MEMORANDUM—Filed October 5, 1936

Both plaintiff and defendant, have filed motions to set aside the judgment and grant a new trial. The argument upon these motions raises some questions that were not before presented by counsel or considered in the original opinion and as to which it may be well to state something further.

The plaintiff does not now ask that interest should be computed on the amount of its recovery but contends that so far as necessary the amount to which it was found entitled should be applied upon the tax to extinguish it, which to this extent would have the same effect as if interest were allowed. But we can find no authority for applying in payment upon a tax previously assessed the amount later allowed by the court on an unliquidated and disputed claim not relating to taxes. The conclusion we have reached brings an inequitable result, but the inequity is not in the failure to make the credit but in not allowing interest on plaintiff's claim. In this matter we are compelled to follow the law as we find it. The motion of plaintiff must be overruled.

The defendant's motion to set aside the judgment, among other matters, sets up a claim that the calculation of plain-[fol. 53] tiff's tax based on the net income and invested capital as determined by the court in the opinion, was not correctly made. A recomputation shows that this contention must be sustained, and it follows that the judgment heretofore entered should be set aside. The total amount of plaintiff's income, war-profits, and excess-profits tax for 1918, when correctly calculated, is found to be $131,479.60. The tax previously paid was $48,778.31, leaving an underpayment of $82,701.29. The interest thereon at six per cent from the date of the additional assessment to April 6, 1936, the date of the establishment of plaintiff's claim and entry of judgment under the opinion, is $58,607.64, thus making the total allowance upon the counterclaim $141,308.93. Deducting therefrom the amount allowed the plaintiff upon its claim, $119,413.04, there remains $21,895.89, for which judgment should be rendered in favor of defendant with interest from that date.

The defendant, in a supplement to its motion for new trial, urges that interest should be computed at the rate of

twelve per cent on the amount of the additional assessment, but this penalty is imposed, if at all, under the applicable statute after a demand is made for the payment of the tax. The record fails to show that any demand was made and we can not presume that it was. On the contrary, in view of the fact that plaintiff at the time was claiming that the defendant was indebted to it in a sum larger than the amount of the tax, it is more probable that no such demand was made.

The contention as to interest and the other objections made on behalf of the defendant will be overruled. Some minor additions to the findings will be made which do not affect the result. These will be shown in the judgment entry. The last finding (42) will be stricken out as pertaining to a claim and issue now abandoned.

[fol. 54] X. **Special Findings of Fact and Conclusion of Law, Filed April 6, 1936, as Amended by the Order of October 5, 1936, and Opinion by Green, J.**

Mr. J. Kemp Bartlett for plaintiff. Williams, Myers & Quiggle and Bartlett, Poe & Claggett were on the briefs.

Mr. George H. Foster, with whom was Mr. Assistant Attorney General Frank J. Wideman, for defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

1. Plaintiff was incorporated in 1915 and, during the times here involved, was a manufacturer of propellers for airplanes. Its business as such was founded upon certain patent rights in the construction and design of propellers for aircraft, assigned to it by the patentee, Spencer Heath, president of the company, who was a pioneer in the design and construction of airplane propellers.

Among the patentee's improvements was the construction of the two-bladed propeller with laminations divided at the hub and joined there by a long slanting joint. This enabled the inventor to match the blades one against the other, which was impossible with a continuous blade or

lamination. This innovation in construction was a recognized improvement, superior to methods of construction involved in designs which the War Department was preparing at the inception of the contract periods herein involved.

[fol. 55] 2. On September 21, 1917, A. C. Downey, Captain, Signal Corps, United States Reserves, by direction of the Chief Signal Officer of the Army, gave plaintiff an order in writing, no. 20005, for "1,000 propellers, for Curtiss OX-5, engines, oak (to be tipped with copper and including box) as per specifications" (enumerating their serial numbers), at $87.65 each, total $87,650, deliveries to be 20 per day commencing September 10, 1917, contract no. 1750 to follow. This order was followed by a formal contract, by and between plaintiff and the said Downey, for and in behalf of the United States, September 25, 1917, numbered 1750, for the material described in order no. 20005 and at the price named therein. Copies of the contract and order are attached to the petition as exhibit no. 1 thereto, and made part of this finding by reference.

The propellers required by this order and contract were of the "training" type.

Plaintiff delivered directly to the Government upon its direction 900 of these propellers, the last shipment on March 20, 1918, and the nine hundred have been paid for. The balance of 100 were made and shipped at the appropriate stage of completion to the Copper Products Company, Boston, Massachusetts, for copper tipping by the process of electrolysis, plaintiff having been directed to do so by defendant's officers for the purpose of testing the process in use at the Copper Products Company's plant, which they thought might be an improvement over plaintiff's method of copper tipping. The propellers so shipped to the Copper Products Company were held by that company some months, until 99 were returned to the plaintiff, and rejected by the Government inspector solely on the ground that the work done by the Copper Products Company was unsatisfactory. These 99 propellers are still in the hands of plaintiff and have not been paid for. The remaining propeller was, by direction of defendant's officers, shipped by the Copper Products Company to the Curtiss Aeroplane Company for experimental purposes and plaintiff has not been paid therefor.

3. On October 4, 1917, Captain Downey, by direction of the Chief Signal Officer of the Army, again delivered to plaintiff an order in writing, no. 20054 for "1,000 propel- [fol. 56] lers, oak, to be tipped with copper, including box, for Curtiss OX-5 engine", and "1,000 propellers, oak, to be tipped with copper, including box, for Hall-Scott, A-7-A engine", all 2,000 propellers at $87.65 each, total $175,300, to be in accordance with enumerated specification numbers, delivery to be at the rate of 125 per month beginning November 1, 1917, on each set, 250 per month on all. This order was followed by a formal contract October 6, 1917, no. 1846, covering the terms of the order, by and between plaintiff and Captain Downey for and in behalf of the United States. Copies of the order and contract are attached to the petition as exhibit no. 2, and made part hereof by reference.

The propellers required by this order and contract were of the "training" type.

In the fulfillment of this order and contract plaintiff began using, with the approval of the War Department, pre-existing designs, nos. 130 and 151, the design of the propeller being determined by the type of engine used. On February 8, 1918, plaintiff was instructed by the Department to substitute design no. 8-25, which was a Government design, on the propellers for the Hall-Scott A-7-A engine. February 12, 1918, this order was countermanded. On March 28, 1918, by wire, confirmed the following day by letter, the Department ordered the use of design 13706 on Hall-Scott A-7-A engines, and asked for the number of propellers that plaintiff would have to complete under the old design. The propellers in process under the old design could not in practice be altered to conform to the new design.

May 9, 1918, plaintiff was by telegram instructed by the Signal Office, War Department, to "cancel all incomplete shipping instructions on order twenty thousand fifty-four except instructions seventh covering twelve OX fives Langley."

May 13, 1918, E. T. Farley, 1st lieutenant, A. S., Sig. R. C., by direction of the Chief Signal Officer of the Army, wrote to plaintiff as follows:

1. With reference to Signal Corps Order No. 20054, you are advised that all uncompleted shipping instructions are

hereby cancelled, with the following exception: Instructions issued under date of May 7, 1918, covering twelve propellers of the OX-5 type to Langley Field, Hampton, Va.

[fol. 57] 2. It is requested that you immediately furnish this office with a list showing all propellers shipped, giving consignees, dates of shipments, and quantities shipped, together with the unshipped balances.

At or about this time defendant's officers instructed plaintiff to suspend operations on all training propellers for four months as the output was exceeding their requirements.

On Order No. 20054, Contract No. 1846, plaintiff delivered to defendant 906 propellers. Of the 906 propellers delivered 820 were accepted and paid for by the defendant. Plaintiff endeavored to obtain shipping instructions for the balance of 1,094 propellers under this contract, and shipping instructions were refused by the defendant's officers. The balance of 1,094 have not been paid for. Shipping instructions were refused because airplanes for training purposes were not being manufactured rapidly enough to absorb the output of training propellers and training propellers were being accumulated faster than they could be used. The balance of 1,094 propellers are now on hand at plaintiff's plant.

4. In the fall of the year 1917, plaintiff's plant was located in Baltimore, Maryland, and was entirely in leased buildings. In or about September, 1917, plaintiff began the erection of a plant in Baltimore on the Key Highway. This plant will hereinafter be termed the Key Highway Plant.

In December 1917 the Key Highway Plant was nearing completion. It consisted of one story with basement one-quarter of the area thereunder, the main floor area being 30,000 square feet. It was built of concrete with walls principally of glass, concrete pilasters being in between the sash, and the roof was provided with numerous openings for sky light. Its structure was such that it would support another story. Building a one-story factory building sufficiently strong to support additional stories was sound practice and not unusual.

5. Toward the last of December, 1917, and when the Key Highway Plant was structurally about completed, Edward L. Ryerson, Jr., lieutenant, Signal Corps, head of the Propeller Section, Equipment Division, Office of the Chief Signal Officer, War Department, and charged with arrangements for the production and procurement of propellers [fol. 58] for the Air Service, including negotiations for the procurement of lumber and in connection with the manufacture thereof, visited the Key Highway Plant for the purpose of informing himself as to plaintiff's facilities for the manufacture of propellers.

At Lt. Ryerson's request plaintiff's president, Spencer Heath, conducted him over the plant. Lt. Ryerson expressed himself as pleased with the general appearance of the place, but said that it was not of sufficient capacity to manufacture the number of propellers the War Department would order from the company, and inquired if another story could be added. Upon being told that it could and that the skylight openings could be closed up, making a satisfactory floor out of the roof, Lt. Ryerson urged Heath to make the addition, to devote the entire floor space of the two stories to operations and provide the necessary office space separately therefrom. After some argument, Heath, insisting that the company would have to be given sufficient Government business to justify the additional space, and Lt. Ryerson, insisting that such business would be forthcoming, promised Lt. Ryerson to make the addition and immediately arranged with the contractor who had already erected the basement and first floor to add another story, necessary elevators, and extra office space.

Plaintiff completed the erection of the Key Highway Plant, including the addition, in the summer of 1918, and moved into it about August 1, 1918.

While the additional construction was going on and until the work was well in progress Lt. Ryerson kept in frequent personal contact with Heath asking to be informed as to the state of the work.

6. The Key Highway Plant, as thus enlarged, required machinery and equipment in excess of that appropriate to the building as first constructed. This included elevators, a battery of upright boilers, additional kilns for the drying of lumber, and machinery in about twice the amount needed for a one-story building.

The original plant was equipped with eight masonry kilns of the box type, and when the floor space was doubled plaintiff installed eight additional kilns of curtain type on [fol. 59] top of the other kilns. In order to dry the lumber furnished by the Government, as hereinafter related, Lt. Ryerson, upon plaintiff's representation that it was necessary to make provision to dry the lumber then being shipped to it by the Government, endeavored to procure additional kiln facilities outside plaintiff's premises. He was unable to do so and insisted upon plaintiff's adding to its facilities sufficient kilns to take care of the number that was then being delivered, or would be delivered, to plaintiff by the Government for the manufacture of airplane propellers. Heath objected that his outlay was already considerable and that there was a limit beyond which he could not be expected to go. Lt. Ryerson continued to urge upon Heath the necessity of additional kiln facilities and told him that it would be necessary to provide adequate dry kiln capacity in order to dry kiln the lumber, that Cutler curtain kilns had been approved by the inspection department, and that he had better go ahead and provide them.

Plaintiff thereupon erected 12 Cutler curtain kilns adjacent to the other 16 kilns at the Key Highway Plant, under the direction of a kiln expert attached to the War Department, and they were operated at all times under this expert's control and direction.

7. February 8, 1918, Lt. Ryerson, by direction of the Chief Signal Officer, advised plaintiff by letter as follows:

Subject: Mahogany

1. In connection with the supply of mahogany lumber we have arranged for the purchase of 152,000 feet of Central American mahogany from the Otis Manufacturing Company of New Orleans, material to be propeller stock 8″ and up in width, not over 5% to be under 9″ and 8′ and up in length firsts, seconds, and selects, not more than 25% selects. This material is being bought by the Signal Corps at $270.00 per thousand, f. o. b. New Orleans, for material 8″ to 17″ in width and $300.00 per thousand, f. o. b. New Orleans, for material 17″ in width and over.

2. Material is ready for immediate delivery and I expect to wire instructions to load for delivery to your plant

at Baltimore for use in production of additional combat propellers.

[fol. 60] 3. It would be desirable to have this material purchased outright by you from the Signal Corps and make your quotations accordingly. We believe this material will be very desirable stock for the manufacture of propellers on account of the large percentage of wider widths.

4. We have also purchased some 40,000 feet of wide stock, 18" and up, from Lewis, Thompson & Company, New York City, at a price of $320.00 per thousand, f. o. b. Astoria, Long Island. We desire to apply this material as well on your orders.

5. Kindly advise us at once as to your suggestions for handling this matter, incorporating your order for the material, if same is in full accord with your understanding as to the best method of handling the matter.

At the time this letter was written and theretofore plaintiff had provided itself with lumber necessary for its pending orders from the open market, and had no contracts or orders from the Government upon which the mahogany lumber referred to could be applied. The mahogany lumber therein mentioned referred solely to orders or contracts for propellers which the War Department intended to give the plaintiff. In 1918 and up to the time of the armistice, mahogany and walnut lumber were under control of the Government. February 15, 1918, plaintiff was advised by wire as follows: "Do not negotiate for purchase of walnut propeller stock. Signal Corps buying all walnut and will take care of all your requirements. Signal Equipment Thirty One." At the time this telegram was transmitted plaintiff had no orders or contracts from the Signal Corps requiring the use of walnut lumber, and the telegram referred solely to future orders or contracts for propellers which the War Department contemplated giving the plaintiff.

Thereafter from time to time the War Department caused to be delivered to plaintiff shipments of walnut and mahogany lumber. June 4, 1918, the Signal Corps in writing required plaintiff to have on hand at all times 150,000 to 200,000 feet of black walnut lumber, to be used

on rush orders for propellers from the Signal Corps. All lumber furnished by the Signal Corps came to plaintiff in a green state, requiring from 30 to 60 days to dry out in plaintiff's kilns before it could be manipulated.

[fol. 61] Up to June 14, 1918, defendant had caused to be delivered to plaintiff for the manufacture of airplane propellers 774,000 feet of walnut and mahogany lumber without prior requisition therefor from plaintiff. This lumber was not needed for contracts existing at the time of delivery. All other deliveries of lumber by the Government were on requisitions by the plaintiff. The prices of said 774,000 feet and all requisitioned lumber determined by the Government and not by plaintiff.

The Government at no time made deliveries to plaintiff of oak lumber.

8. Following negotiations in January 1918, F. D. Schnacke, 1st lieutenant, Sig., R. C. A. S., by direction of the Chief Signal Officer of the Army, gave plaintiff, February 11, 1918, a written order, no. 30619, for 60 propellers for U. S. 12 engines, as per specifications, of mahogany or walnut, at $184 each, total $11,040, including box, 30 to be ready for delivery January 31, 1918, the remainder February 15, 1918. This was followed by a formal contract, no. 2907, February 15, 1918, embodying the order, by and between plaintiff and Lt. Schnacke for and in behalf of the United States.

These propellers were delivered and paid for. They were of the type known as "combat" propellers. The material therefor was procured by plaintiff in the open market.

9. In the latter part of February 1918, Lt. Ryerson gave plaintiff a verbal order for 750 combat propellers of plaintiff's design, to be made from plaintiff's stock, and delivered in March 1918. A few days thereafter Lt. Ryerson verbally increased the order to 1,000 propellers. March 13, 1918, he instructed plaintiff by wire to discontinue work on this order and asked if it could substitute at once Hispano propellers, to be of oak, no copper tips, in accordance with drawing then being sent to plaintiff, and what was the earliest date delivery could commence. March 14, 1918, Lt. Ryerson, by direction of the Chief Signal Officer, con-

firmed the order for 750 combat propellers by letter as follows:

1. We find that we have never confirmed our understanding with you that you were to proceed with the gluing up of blocks for use on combat propellers as per arrangements made with Lieutenant Ryerson.

[fol. 62] 2. This agreement incorporated the use of wideners and splices where necessary in the construction of these blocks for combat propellers. It was understood that mahogany or oak would be used, mahogany being given the preference and use as far as possible with the stock available.

3. The arrangement was made with the understanding that you were to produce 750 combat propellers in March, provided final information with regard to pitch and design could be obtained in sufficient time to permit the finishing of these blocks within the time specified.

4. It was originally understood that these blocks would be built up so as to be finished in accordance with your own dynopter type design as per sample being sent to Dayton for tests. It was later agreed that the blocks would be so changed as to permit the finishing of propellers up to 10′ diameter and with pitch and other dimensions to be determined by later tests, provided such dimensions could be applied in the construction of these blocks.

5. You will furnish us, upon receipt of this, an accurate statement of the status of this matter, indicating the number of blocks in process, the number that can be applied on 10′ diameter blades as well as the number that must be applied on blades of the dynopter type design.

6. It is understood that this procedure was adopted as an emergency measure, in order to make possible the production of combat propellers with as great rapidity as possible in spite of the fact that no approved design could be furnished for the execution of a contract in a regular manner.

7. It was understood that as soon as tests could be made to determine the proper pitch and design that could be applied on these blocks that negotiations would be entered into for the purchase of a number of completed propellers

represented by the blocks which you have constructed for this purpose.

There was no confirmation of the verbal increase to 1,000 propellers.

On March 13, 1918, plaintiff had in process some 400 of the 750 propellers so ordered, of which 184 (hereinafter referred to) were in the last stages of completion, 172 thereof being glued and 12 not glued, the balance of the material being thereafter diverted to other work. The lumber used in their construction was of quartered white oak. [fol. 63] Plaintiff discontinued work on the combat propellers as instructed in the telegram of March 13, 1918, and has not been paid by the defendant for any of the labor or material used in the performance of the foregoing order.

The 184 propellers brought to the last stages of completion are still in storage at plaintiff's plant and have not been paid for.

10. On March 22, 1918, Lt. Schnacke, by direction of the Chief Signal Officer of the Army, gave plaintiff an order in writing, no. 20858, for 300 propellers for Hispano Suiza engines, in accordance with specifications, to be made of quartered white oak, birch or cherry, at $110 each, without copper tips, but with individual boxes for shipment, total $33,000, delivery to begin immediately, to be completed on or before April 15, 1918. Contract no. 3348, dated March 25, 1918, embodying this order, followed, by and between plaintiff and Lt. Schnacke for and in behalf of the United States.

These propellers were known as "training" propellers.

The order was given to plaintiff on representations by defendant's officer that it was an emergency order and would have to take precedence over all other work. Plaintiff gave it precedence and completed delivery of the propellers on or about April 15, 1918, and received the contract price therefor.

11. On March 22, 1918, Lt. Schnacke, by direction of the Chief Signal Officer of the Army, placed with plaintiff a written order, no. 20859, for 100 propellers, oak copper tipped, for Curtiss, V-2, type 3, on R-4 airplanes, at $127 each, total $12,700, to be in accordance with Signal Corps specifications, delivery to begin April 1, 1918, and the entire order to be completed by May 1, 1918. This was fol-

lowed March 25, 1918, by a formal contract, no. 3347, embodying the previous order, by and between plaintiff and the said Lt. Schnacke for and in behalf of the United States. Copies of this order and contract are attached to the petition as exhibit no. 3, and are made part hereof by reference.

These propellers were of the "training" type. Of the number contracted for, 90 were delivered, accepted and paid for.

[fol. 64] 12. On March 23, 1918, Lt. Schnacke, by direction of the Chief Signal Officer of the Army, gave plaintiff a written order, no. 20860, for 500 propellers for Curtiss OX-5 engines, to be of oak and copper tipped and in accordance with Signal Corps specifications, at $76 each, total $38,000, to be ready for inspection six weeks after receipt of order. This was followed by a formal contract March 25, 1918, no. 3349, embodying the previous order, by and between plaintiff and Lt. Schnacke for and in behalf of the United States. Copies of the order and contract are attached to the petition as exhibit no. 4 and made part hereof by reference.

These propellers were of the "training" type. Of the number contracted for, 379 were delivered.

13. May 14, 1918, Lt. Schnacke, by direction of the Chief Signal Officer of the Army, placed with plaintiff a written order no. 21128 for 3,000 propellers for U. S. 12 engines, without tips, of walnut, in accordance with Signal Corps specifications and the Charavay design, at $100 each, total $300,000. Deliveries were to begin June 15, 1918, and continue at the rate of 40 propellers a day, the order to be completed by September 15, 1918. This order was followed by a formal contract May 16, 1918, no. 3870, embodying the previous order, between plaintiff and Lt. Schnacke for and in behalf of the United States. Copies of the order and contract are attached to the petition as exhibit no. 5 and are made part hereof by reference.

These were known as "combat" propellers.

June 25, 1918, plaintiff had completed 47 of these propellers.

On July 18, 1918, plaintiff, on receipt from the War Department of instructions to do so, shipped to the Dayton Wright Aeroplane Company 102 propellers to apply on contract no. 3870, order no. 21128. This shipment was accepted and paid for and as to it there is no controversy.

In the summer of 1918 and while plaintiff was engaged in the performance of contract no. 3870, order no. 21128, the War Department decided to abandon the Charavay design and did abandon it in August 1918, and pursuant to such decision plaintiff was on August 2, 1918, directed in writing by the Bureau of Aircraft Production, War Department, [fol. 65] "to stop all gluing operations on order No. 21128 until further instructions." The number of propellers of the Charavay design in process August 2, 1918, was 871. Captain (formerly lieutenant) Schnacke on August 19, 1918, by direction of the Director of Aircraft Production, increased the price on contract no. 3870, order no. 21128, by $6,000, to cover certain extra wrapping and packing at $2 per propeller.

There were delivered to and accepted by defendant, on or about August 23, 1918, 102 propellers of the Charavay design on this contract, which have not been paid for, made, packed, and delivered at the price of $100 per propeller, amounting to $10,200. August 30, 1918, the Director of Military Aeronautics, through the Aviation Officer, Expedition Depot, Baltimore, Md., in writing asked of plaintiff shipping instructions for their return. No reason was assigned for returning them. Plaintiff did not furnish shipping instructions and they have not been returned to plaintiff.

The Bureau of Aircraft Production by telegram August 26, 1918, directed plaintiff to "hold all production on order twenty-one one twenty-eight."

The propellers of the Charavay design in process and not completed by plaintiff at the time of abandonment of the design could not be adapted to designs substituted by the War Department and had to be scrapped.

August 26, 1918, plaintiff in writing protested to the Director of Aircraft Production that due to interference on the part of his officers the company was unable to proceed with performance of Contract No. 3870, Order No. 21128, and asked for an investigation and relief. September 2, 1918, plaintiff in writing demanded of the Acting Director of Aircraft Production "payment for work performed and suitable compensation for losses and damages sustained" on Order No. 21128, Contract No. 3870.

14. July 13, 1918, O. R. Ewing, Capt. A. S. (P) N. A., acting by direction of the Director of the Bureau of Aircraft Production, placed with plaintiff an order in writing,

No. 740026, for 2,000 constant speed regulating air fans, as per sample, at $29.38 each, total $58,760, to be delivered at [fol. 66] the rate of 100 per week after 30 days, and 200 fans per week in 60 days, after date of receipt of order, 35 to be delivered within 30 days after date of receipt of order. Contract No. 4301 followed and embraced this order, was dated October 16, 1918, and was entered into between plaintiff and Capt. Schnacke, representing the United States.

December 6, 1918, Capt. Schnacke, acting by direction of the acting Director of Aircraft Production, wrote plaintiff in respect to Order No. 740026 as follows: "You are hereby instructed to stop all production under this order, and incur no further expense in connection therewith."

December 19, 1918, a settlement contract, No. 4301-A, was entered into between plaintiff and defendant, terminating the original contract, and providing for the delivery of 100 air fans thereunder in addition to those already delivered, and no more, and for the payment to plaintiff by the United States of $38,758.43 upon the delivery of the 100 air fans, as full and final compensation under the original and settlement contracts.

Delivery of the air fans called for by the settlement contract was made to the defendant on or about December 28, 1918, bill for the sum of $38,758.43 presented by plaintiff, and payment refused, and no part thereof has been paid by the defendant.

15. On August 26, 1918, Capt. Schnacke, by direction of the Director of Aircraft Production, gave plaintiff a written order No. 720376, for 184 propellers for D H 4 planes with U. S. 12 engines, to be manufactured from quartered white oak, or from mahogany, according to specifications, at $150 per propeller, including individual boxes for shipment, total $27,600, delivery to be completed by October 1, 1918, Contract No. 4578 to follow. This order related to the 184 propellers brought to the last stages of completion on the order for 750 propellers, hereinabove referred to in Finding 9. Embodying this order, Capt. Schnacke, representing the United States as party of the first part, signed and transmitted to plaintiff as party of the second part a formal con- [fol. 67] tract, No. 4578, dated August 29, 1918. Plaintiff refused to accept the order or sign the contract, by reason

of the fact that they required the 184 propellers to be made in accordance with specifications not in existence at the time the original order for 750 propellers had been given and which were physically impractical to apply to the propellers already brought to the final stages of completion.

Copies of Order No. 720376 and form of Contract No. 4578 are attached to the petition as Exhibit No. 6 thereof and are made part of these findings by reference.

16. Beginning late in August 1918 and extending into November 1918, representatives of plaintiff and of the Bureau of Aircraft Production held several conferences upon the subject of plaintiff's contracts with the War Department and their mutual obligations thereunder. Among those present representing the Bureau of Aircraft Production was its acting director, W. C. Potter, and Lt. Col. A. C. Downey, for the Contract Department, Bureau of Aircraft Production. Plaintiff was represented by its president, Spencer Heath, and counsel. The final conference was held November 13, 1918, and as a result thereof the plaintiff proposed in writing that all completed and uncompleted work on orders other than the order for Charavay propellers, #21128, as to which the defendant was to further advise plaintiff, should be paid for—

on a basis of cost of materials, all direct and indirect labor costs, all overhead charges, direct and indirect, covering the entire period since the beginning of work on the material and 10% profit on the costs so obtained except upon the cost of any material used in connection with the work which was supplied by the Government and not paid for by us.

This proposition was agreed to by the defendant in writing.

17. Some time prior to February 25, 1919, plaintiff submitted to the Air Service Claims Board its claim under the Potter-Downey agreement, and hearings were had thereon wherein plaintiff was confronted with an allegation of default in deliveries. The claim was disallowed by the Board February 25, 1919, because of the alleged default. July 13,

1920, the disallowance was rescinded by the Air Service Section, War Department Claims Board, and the claim ap- [fol. 68] proved in the sum of $181,467.66, based upon the following set-up:

1. Inventory of finished and partly finished propellers	$37,306.25
2. Inventory of walnut lumber	129,053.61
3. Inventory of packing boxes	5,756.76
4. Loss from cancellation of packing contract with Security Storage & Trust Co.	177.42
5. Loss on copper	752.15
6. Storage and insurance on inventory of finished and partly finished propellers from November 21, 1919, to June 21, 1920	7,163.48
7. Amount of payments by contractor for assisting U. S. Government officials in taking inventory April 17, 23, 1918	1,143.64
8. Office and administration expense	114.35
Total	181,467.66

The Government was to take title to all the property which it paid for.

Plaintiff appealed to the appeal section of the War Department Claims Board, which acted thereon April 13, 1921, and from the decision of the appeal section plaintiff appealed to the Secretary of War who, on May 7, 1921, affirmed the decision of the appeal section. Plaintiff refused to accept the decision of the appeal section, so affirmed by the Secretary of War, and on May 27, 1921, the appeal section entered an order denying all relief.

18. Plaintiff ceased manufacturing propellers for the War Department in September 1918, except for work undertaken in subsequent years, not involved in this suit.

Subsequent to the Potter-Downey agreement an inventory was taken of propellers substantially finished, and of laminations, on hand at plaintiff's plant and not paid for, applicable to the transactions hereinabove described. There were found 2,694 propellers and 4,816 laminations, of the following numbered patterns:

Pattern Number	Laminations	Propellers
130	615	1,149
149	10	....
150	208	206
151	297	40
154	104	74
158	71	28
160	811	1,389
165	578	1,930
	2,694	4,816

[fol. 69] Pattern no. 130 was used on contract no. 1750, order no. 20005, and contract no. 1846, order no. 20054; pattern no. 149 on contract no. 3347, order no. 20859; pattern no. 150 on contract no. 1846, order no. 20054, and on contract no. 3349, order no. 20860; pattern no. 151 on contract no. 1846, order no. 20054; patterns nos. 154 and 158 on the verbal order for 750 combat propellers given in February 1918, and to which unsigned contract no. 4578, order no. 720376 relates; pattern no. 160 on contract no. 1846, order no. 20054; and pattern no. 165 on contract no. 3870, order no. 21128.

Patterns nos. 154, 158, and 165 were for combat propellers; all other patterns were for training propellers.

It is not possible from the record to allocate to the several contracts or orders the propellers and laminations so inventoried except as may be deduced from the enumerations set forth in this finding.

Material, labor, and overhead expense on these 2,694 propellers and 4,816 laminations cost plaintiff $139,150.36, which with ten-percent profit amounts to $153,065.37, no part of which has been paid by the defendant. Their salvage value is problematical. They are now in storage at plaintiff's plant.

19. In August 1919 the War Department, claiming the Government to be the owner thereof, removed from plaintiff's premises 395,040 feet of unused walnut lumber, theretofore delivered to the plaintiff for use on Government contracts for propellers and charged to plaintiff's account. Based on lumber invoiced to the plaintiff, the credit to plaintiff on account of the removal of the lumber, including

expenses properly incurred thereon by plaintiff while in its possession, would be $145,741.71, which with 10% profit on such expenses, would amount to $147,142.86, in reduction of the charge theretofore made against the plaintiff.

20. The cost to plaintiff of unused packing boxes purchased especially for the shipment of propellers under the foregoing orders and contracts was $6,767.18, which with 10% profit amounts to $7,443.90. These boxes are now in plaintiff's hands. No part of $7,443.90 has been paid by the defendant. Their present salvage value is not of a substantial amount.

[fol. 70] 21. Plaintiff's loss due to its enforced cancellation of a contract with the Security Storage & Trust Company for packing 2,900 walnut propellers applying on Signal Corps contract no. 3870, order no. 21128, amounts to $1,724.35, which with 10% profit thereon amounts to $1,896.79, no part of which has been paid by the defendant.

22. The cost to plaintiff of sheet copper and copper rivets, purchased especially for tipping propellers on the several contracts and orders not completed, and on account of stoppage of the work, not used, amounts to $1,543.89, which with 10% profit is $1,698.28, no part of which has been paid by the defendant. Their present salvage value does not appear. They are now in storage on plaintiff's premises.

23. Plaintiff's overhead expense, applicable to the contracts and orders in suit, from the date of cessation of manufacture thereunder to November 20, 1918, was $76,695.83, which with 10% profit amounts to $84,365.41, no part of which defendant has paid.

24. Plaintiff's expense for storage, fire insurance, hauling and handling, and watchmen's services, from November 21, 1918, to January 21, 1922, beyond which date there is a continuing expense for storage, was, for the material described in Finding 18, $6,277.80, which with 10% profit, aggregates $6,905.58, no part of which has been paid by the defendant.

25. Plaintiff's loss from the erection of second story and office floors of the Key Highway Plant and installation of additional equipment, described in Finding 5, making

proper allowance for a proportionate part of the price of the entire building and equipment on the eventual sale thereof, amounts to $25,605.62.

26. Plaintiff expended for repairs, alterations, additions, and betterments on leased premises, used as manufacturing plants, for the purpose of expediting the production of propellers for the War Department, on contracts and orders involved herein, less a suitable proportion applicable to propellers completed and shipped, $15,583.69, which amount is a loss to plaintiff.

27. Plaintiff expended for machinery and equipment built, partially built, or purchased by it, especially for the [fol. 71] purpose of expediting the production of propellers for the War Department on orders and contracts involved herein, less a suitable proportion on machinery and equipment built or purchased applicable to propellers completed and delivered, $37,963.69. The fair salvage value thereof is $15,739.34, and the loss to plaintiff thereon is $22,224.35.

28. The expense to plaintiff of purchase and installation of 12 Cutler curtain kilns, purchased and installed under the circumstances recited in Finding 6, was, less due allowance for propellers completed and delivered, $19,035.60. The salvage value of these kilns was $2,600, and plaintiff lost the difference in value, or $16,435.60.

29. For dies made for cutting copper tips on the contracts or orders enumerated in Finding 18, less a proper allowance for propellers completed and delivered, plaintiff expended $851.76, no part of which has been paid by the defendant. They were made for a special purpose and when the occasion for their use disappeared had no value except as junk, which would be merely nominal.

30. In anticipation of orders from the War Department plaintiff purchased clamps which were thereafter found to be in excess of actual requirements. They were required as part of the equipment for the addition to the Key Highway Plant and would have been needed if orders had been received from the War Department sufficient to run the plant at its capacity. They were not in fact used, now have only an inconsiderable salvage value, which does not defi-

nitely appear, and are in storage at plaintiff's factory. Plaintiff paid for them $4,134.64.

31. In order to provide transportation equipment sufficient to care for the needs of its plant as enlarged in the manner and to the extent heretofore described, plaintiff purchased two extra motor trucks. For them plaintiff's expenditure, less a proportion applicable to propellers completed and delivered, was $5,002.83. The trucks were sold by plaintiff at a price the appropriate portion thereof, here applicable, is $2,891.13, a difference of $2,111.70, which amount was lost by plaintiff.

32. For boiler plant purchased and installed especially for the purpose of expediting the production of propellers for [fol. 72] the War Department the plaintiff expended, with appropriate deduction, for boilers and equipment actually used, of an amount applicable to propellers completed and delivered, $9,796.97. The fair salvage value thereon is $5,388.34, a difference of $4,408.63, which amount is a loss to the plaintiff.

33. The propellers, 102 in number, at $100, total $10,200, that were delivered to and accepted by the defendant, and thereafter offered to be returned, as recited in Findings 13 and 16, and embraced in the Potter-Downey agreement, did not embody any departures of design which would have rendered them less serviceable for use than propellers as to which no departure from the design was alleged, and defendant's engineering department so found to be a fact. It is conceded that plaintiff should recover on this item.

34. There is due the plaintiff on various unpaid items, set forth in the petition at pages 14 and 15 thereof, the sum of $57,364.51, as to which there is no dispute.

35. There is due the defendant from plaintiff $437,891.01 for lumber delivered by it to the plaintiff from time to time to apply on orders and contracts of the War and Navy Departments. This offset is conceded by the plaintiff and the amount thereof claimed and agreed to by the defendant.

36. In all instances written orders were preceded by verbal orders and plaintiff began to manufacture propellers before receipt of the formal order. In complying with all

verbal orders plaintiff assumed that the issuing officers had sufficient authority therefor, and did not inquire into their contractual powers. No claim is made that the officers who gave orders for propellers, either verbal or written, did not have authority so to do.

37. During the period it was manufacturing propellers for the War Department plaintiff was making a considerable number for the Canadian Government.

Commencing in June 1918, plaintiff began the manufacture of propellers also for the Navy Department of the United States. All propellers manufactured for and delivered to the Navy Department have been paid for and no claim is made upon them.

[fol. 73] 38. During the progress of the work for the War Department plaintiff represented to its officers that it was investing its resources for emergency work without sufficient business from the War Department to recoup the expense, and in writing April 18, 1918, made formal protest to the Chief Signal Officer of the Army with respect to the situation complained of.

39. Plaintiff has at all times been ready, willing, and able to complete its contractual obligations to the War Department, and is now prepared to turn over to the defendant all property in its possession belonging thereto upon settlement of its claims herein.

Counterclaim

The petition in this case was filed February 25, 1922. On September 4, 1926, defendant filed a counterclaim for $19,512.44, with interest, comprising alleged unpaid additional assessment in 1920 of income taxes. An amended counterclaim was filed November 12, 1927, embracing the items of the original counterclaim and adding thereto alleged unpaid additional assessments made in 1923 and 1924, making a total of $212,870.58.

The counterclaim as amended rises under the following circumstances:

40. On or about April 27, 1918, plaintiff filed with the collector of internal revenue its corporation income-tax return for the calendar year 1917 indicating a tax due

thereon of $20,506.81, and its corporation excess-profits-tax return for the same year indicating a tax due thereon of $18,242.88, a total income and profits tax of $38,749.69, which was assessed and paid.

September 2, 1920, the Commissioner of Internal Revenue made an additional assessment of $18,280.48 for 1917 against plaintiff, which plaintiff has not paid.

March 26, 1923, the Commissioner made a further additional assessment against plaintiff for 1917 of $1,954.37, which plaintiff has not paid.

Plaintiff was duly notified of both assessments.

The total of the two additional assessments for the year 1917 is $20,234.85, and there is no evidence that the basis or calculation thereof is incorrect.

[fol. 74] 41. For the calendar year 1918 plaintiff, on or about June 16, 1919, filed with the collector its corporation income and profits tax return indicating a tax due thereon of $48,778.31, and on June 21, 1920, an amended return indicating a tax in the lesser amount of $39,304.06, a difference of $9,474.25. The original tax of $48,778.31 was assessed and paid.

June 14, 1924, the Commissioner assessed against plaintiff a tax for 1918 of $191,403.77, in addition to that already assessed and paid, and duly notified plaintiff with regard thereto. No part thereof has been paid by the plaintiff.

In its original and amended returns for 1918, plaintiff computed its war-profits and excess-profits tax under section 301 (a) of the Revenue Act of 1918. In its amended return it indicated a net income of $66,996.38 by reason of which it did not benefit by the application of section 302 of the act.

The additional assessment of $191,403.77 for the year 1918 was computed by the Commissioner by revising plaintiff's amended return for that year as follows:

Income reported		$66,996.38
Add:		
Inventory adjustments:		
(1) Walnut lumber	$70,351.95	
(2) General stores	23,442.50	
(3) Material purchases overstated	42,421.68	

(4) Ordinary expenses overstated	124.34	
(5) Amortization disallowed	106,558.87	
		242,899.34
		309,895.72
Less additional depreciation allowed		6,429.24
Amended net income		303,466.48

The invested capital was computed by the Commissioner as follows:

Capital stock	$12,900.00
Surplus	82,070.90
Reserve for bad debts	425.00
	95,395.90
Less 1917 tax due June 15, 1918, $40,741.71 prorated 200 days	22,324.23
(6) Adjusted invested capital	73,071.67

With these adjustments the Commissioner computed the profits-tax liability under section 301 of the Revenue Act of 1918, as $234,527.45 and under section 302 thereof, [fol. 75] $231,873.18. The ultimate tax he accordingly figured as follows, deducting from net income an item of $352.49 interest on obligations of the United States, heretofore included by the taxpayer in gross income:

Net income		$303,466.48
Less:		
Profits tax	$231,873.18	
Exemption	2,000.00	
Interest	352.49	
		234,225.67
		69,240.81

Taxable at 12%	8,308.90
Profits tax	231,873.18
Total tax liability	240,182.08
Less previously assessed and paid on original return	48,778.31
Additional tax	191,403.77

(1) Walnut lumber, $70,351.95.—The sum of $70,351.95, added by the Commissioner to inventory, is the amount used by plaintiff in its return to reduce an inventory of lumber December 31, 1918, to its estimate of "realizable value." Without such reduction its inventory of lumber would stand at the price delivered and invoiced to it by the Government under the contracts and orders hereinabove described. The Commissioner valued the walnut lumber on hand at the time of the closing inventory at cost, which was $108,477.98 greater than the market value.

(2) General stores, $23,442.50.—In its return for 1918 plaintiff reduced its inventory of general stores, taken December 31, 1918, at cost, by $23,442.50, to adjust the inventory to market value. The fair market value was $28,545.79, and the inventory at cost $51,988.29. The said sum of $23,442.50 is the addition to inventory of general stores made by the Commissioner.

(3) Material purchases overstated, $42,421.68.—The sum of $42,421.68 added by the Commissioner to inventory for "material purchases overstated" was accounted for by the examining field agents of the Bureau of Internal Revenue as "machinery purchases charged to operation instead of being capitalized." There is no satisfactory proof that the Commissioner's adjustment of this item is incorrect.

[fol. 76] (4) Ordinary expenses overstated, $124.34.—The increase in inventory by reason of "ordinary expenses overstated" was $124.34. There is no satisfactory proof that this adjustment by the Commissioner was incorrect.

(5) Amortization disallowed, $106,558.87.—In its first return for 1918 plaintiff claimed for amortization of war facilities $111,388.67, decreasing it to $106,558.87 in the amended return. For the Key Highway Plant plaintiff, out of the amortization of $106,558.87, claimed as applicable to

the year 1918, $51,120.75. This is a fair amount for amortization of the Kay Highway Plant for the year 1918.

A reasonable allowance for amortization on miscellaneous machinery, tools, and equipment, used in the manufacture of articles contributing to the prosecution of the war is, for the year 1918, $45,667.82.

The total reasonable amortization for plant and machinery is $96,788.57.

(6) Adjusted invested capital, $73,071.67.—In its amended return for 1918, plaintiff reported a net invested capital of $192,456.83. Plaintiff calculated this as follows:

Capital stock	$120,000.00
Surplus	122,097.98
Total	242,097.98
From which it deducted the following items:	
Valuation of patents	38,404.55
Proportion of Federal taxes paid	11,236.60
Total	49,641.15
Net invested capital	192,456.83

The Commissioner revised the net invested capital to $73,071.67, calculated as follows:

Capital stock	$12,900.00
Surplus	82,070.90
Reserve for bad debts	425.00
Total	95,395.90
From which he deducted:	
Proportion of Federal taxes due	22,324.23
Net invested capital	73,071.67

Upon its organization plaintiff acquired as assets the patent rights on the design and construction of propellers, hereinabove described in Finding 1, issuing stock of the par [fol. 77] value of $107,100 therefor. Their value January 1, 1918, depreciated from $107,100, was $68,154.45. At the time of their acquisition, the patents were worth the par value of the stock so issued.

These patents were essential to the conduct of plaintiff's business. At the times involved in this suit propellers made according to the design and construction, so patented, were of demonstrated superiority, generally, over other propellers and plaintiff's success depended materially on this fact.

There is not sufficient evidence to make a calculation of plaintiff's net invested capital and the amount of its taxes for the year 1918 except by using the Commissioner's computation as the basis and revising it where the evidence shows it to be incorrect.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the defendant is entitled to recover.

It is Therefore ordered and adjudged that the defendant do have and recover of and from the plaintiff the sum of twenty-one thousand eight hundred ninety-five dollars and eighty-nine cents ($21,895.89) with interest as provided by law from April 6, 1936, being the date when the former judgment was entered.

Opinion

Green, Judge, delivered the opinion of the court:

The plaintiff during the World War was engaged in the manufacture of airplane propellers and was given a series [fol. 78] of orders by defendant for these propellers. In preparation for the work required and in order to expedite it, the plaintiff enlarged its plant, installed additional machinery and equipment and otherwise increased its facilities. As the work progressed the defendant suspended or canceled orders which it had given by reason of change in design or some other cause and finally as the war came to a close suspended work on the contracts altogether. Some of the propellers ordered were finished and paid for, some were finished but not paid for, and there were a large number upon which more or less work had been done at the time when the contracts were canceled. After all work on the propellers had ceased by reason of directions received from defendant, the plaintiff and defendant entered into an agreement known as the Potter-Downey agreement which provided for payment to the plaintiff for the work it had done on the unfinished propellers and for the cost of mate-

rial used in this work. But after this agreement had been executed the plaintiff and defendant were still unable to agree as to the amount to which plaintiff was entitled under the contracts and plaintiff has not been paid even the amount provided for by this so-called Potter-Downey agreement. Plaintiff now brings this suit to recover the amount which is due under this agreement and also the loss and damage which it alleges it has sustained by reason of the suspension and cancellation of the contracts.

The defendant has filed a counterclaim for taxes assessed for the three years 1917, 1918, and 1919 but it is conceded that any further collections for the years 1917 and 1919 are barred by the statute of limitations.

In plaintiff's petition, seventeen items of charges, loss and damage are listed against defendant totaling $582,129.-04. Plaintiff concedes, however, that there is due the defendant for lumber $437,891.01 and asks judgment for the balance, $144,238.03.

Eight of plaintiff's claims are conceded by defendant and it is only necessary in determining the amount of plaintiff's recovery to pass on the disputed items which will be hereinafter set out and considered.

Among the claims disputed by defendant is one for $84,-365.41 "for continuing overhead expenses from date of dis-[fol. 79] continuance of manufacture to date of termination of contracts" which includes 10 per cent profit thereon.

The so-called Potter-Downey agreement which will be considered more at length hereinafter provided for the payment to plaintiff of overhead expenses and 10 per cent profit thereon. The agreement clearly covered the claim now being considered but it is said that plaintiff was at the same time engaged on work for other parties and that it has failed to establish by the evidence the proportion of overhead properly chargeable to defendant. This is a question of fact upon which the commissioner of this court found in favor of the plaintiff. After reviewing the evidence we agree with the court commissioner and think it would serve no useful purpose to discuss the oral and written testimony in relation to this item. It is therefore allowed to plaintiff.

The next item of plaintiff's claims disputed by defendant is $34,306.55 "for loss resulting from erection of second story and office floors of claimant's Key Highway Plant

and from installing additional special equipment therein."

The evidence shows that in preparation for the work contemplated by the contracts the plaintiff added a second story to what was known as its Key Highway Plant and that this second story was specially fitted and equipped for use in connection with the lower story in constructing propellers. Defendant does not deny this but says that there was no agreement that the Government should pay for an addition to plaintiff's plant, or for additional machinery and equipment, and if there had been such an agreement the officer of defendant that made the arrangements with plaintiff had no authority to make any such contract. This may be conceded for the purposes of the argument but we do not think these matter- prevent plaintiff's recovery thereon. The evidence, however, does show that Lieutenant Ryerson, head of the propeller section who was charged with making arrangements for the production of propellers for the air service, visited plaintiff's plant and while expressing himself as pleased with it in a general way said it did not have capacity to manufacture the number of propellers that the War Department required and urged plaintiff to add another story with additional facilities, and plaintiff, through its president, agreed so to do. Subse- [fol. 80] quently, having in the meantime received orders for a very large number of propellers, the plaintiff went ahead with the construction of the second story which was completed sometime in the middle of summer in 1918.

The case is very similar to that of the Barrett Co. v. United States, 273 U. S. 227. In that case the Navy Department contracted for certain materials to be furnished within a given time. The contract also provided for the construction of a plant with equipment with which to carry out its provisions. The plaintiff, believing that a larger plant than was contracted for would be necessary for the manufacture of the material required by the Government, expended a large sum to increase its capacity. None of these changes were directly authorized or approved by the Navy Department but the Supreme Court said that the plaintiff was entitled to just compensation under the statute and that just compensation included "the outlay which it can show there was reasonable ground for making in order to fulfill its engagements." What we have stated above with reference to the case now before us shows that as the

Government requirements were presented to plaintiff there was abundant reason for an enlarged plant and additional facilities.

The defendant, however, contends that the Barrett Co. case, supra, and other similar cases have no application for the reason that they were based on the statute of June 15, 1917, which provided for just compensation whenever war contracts were suspended, canceled, or modified but applied only to contracts for the "building, production, or purchase of ships or material", and that other language in the statute shows that the word "material", as used therein, refers only to stores, supplies, and equipment for ships. This seems to be a very narrow construction of the statute but we can find no case in which it has otherwise been applied. The defendant not only insists that the statute referred to above has no application to the case now before the court, but says also that if it did apply, the contracts were not canceled pursuant to its provisions. We do not think this precludes the plaintiff from recovering for loss or damage occasioned by the cancellation or suspension of the contracts. The general principles in relation to con- [fol. 81] tracts will still apply and plaintiff is not left without a remedy for violation of the agreements, express or implied, made by defendant. Under well settled authority plaintiff could have elected to treat the contracts as still in force and if it had so elected could recover for potential profits, but by executing the Potter-Downey agreement it elected to consider the contracts terminated by the breach thereof made by defendant. We are clear that plaintiff may recover what it lost by reason of the cancellation of the contracts even if it be conceded that there is no special statute which so provides.

This court and the Supreme Court long ago fixed the rules for the measure of damage when a contract was suspended or canceled in the case of Behan v. United States, 18 C. Cls. 687, affirmed in United States v. Behan, 110 U. S. 338. In that case this court said that "in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained." The Supreme Court, in passing on the same question, said with reference to the contractor's rights in such a case—

When he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services.

The Supreme Court went on further to say that the contractor may also claim and recover, if proved, anticipated profits. In the case at bar there is no attempt to show any anticipated profits, probably because the Potter-Downey agreement rendered such profits not recoverable, but the Supreme Court went on to say that—

It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend * * * after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract.

[fol. 82] There is nothing to show that any of the expense incurred by the plaintiff was extravagant and unnecessary for the purpose of carrying out the contracts. On the contrary, when we consider all of the testimony and the circumstances under which the contracts were made it appears that plaintiff had good cause and reason to make the additional expenditures by reason of which it incurred the losses which it now seeks to recover. The contracts were made in war times. It is a matter of common knowledge that the Government was then in urgent need of airplanes. War never admits of delays or even of ordinary preparations and exertions. Its needs are urgent and pressing and it must have been well understood by plaintiff that it was making contracts to supply what are commonly referred to as "rush orders." Plaintiff was told by one of defendant's officials that its plant was insufficient and the evidence as a whole shows that it was amply justified in providing additional facilities for hastening the completion of the orders which it received.

As a further objection to this claim, and the remainder of the disputed items, it is urged on behalf of defendant that plaintiff can not recover for loss and damage resulting

from cancellation or suspension of the contracts by reason of the so-called Potter-Downey agreement set out in Finding 16 to which reference has heretofore been made. It is contended that this agreement disposed of all claims of every kind and nature which the plaintiff held against the defendant arising out of orders given for construction work.

The so-called Potter-Downey agreement was divided into two parts, one which related to the item of $10,200 for Charavay propellers which was left unsettled but is now conceded by defendant, and another part which provided that the plaintiff should—

> be paid for all *work* as it now stands on a basis of cost of materials, all direct and indirect *labor costs*, all *overhead charges* * * * and *10% profit* on the costs so obtained * * *. [Italics ours.]

It is contended on behalf of defendant that this agreement operated as a full settlement of all claims arising out of the contracts including the claims which are now in dispute. This contention can not be sustained. If it had been [fol. 83] intended that this agreement should act as a full settlement to all claims which the plaintiff held there is every probability that it would have been so provided in express language, for this would have been the ordinary and usual course. Moreover, the agreement mentions three and only three distinct items for which payment was to be made, namely, work, labor costs, and overhead charges. It provided for the recognition and measuring of claims based on these matters. Obviously the plaintiff had other claims against the defendant growing out of the suspension and cancellation of the contracts, some of which had already been presented to defendant. There is no evidence to show that these claims were taken up in any manner when the negotiations were had that led to the Potter-Downey agreement. On the contrary, as the agreement made specific mention of certain of plaintiff's claims against defendant this tends to show that those not mentioned were excluded from its operation. A reasonable construction of the Potter-Downey agreement under all of the circumstances of the case shows that it settled nothing except those matters included in its specifications, and it can not properly be contended that these specifications covered the claim for

the addition of the second story to the Key Highway Plant and the equipment connected therewith or any of the remaining disputed claims which will next be considered. This claim therefore should be allowed.

The amount of the loss of plaintiff incurred by reason of the construction of the second story of the Key Highway Plant with its equipment was found by the court commissioner to be $25,605.62, and with this finding we concur. Plaintiff also claims to be entitled to 10 per cent profit on this amount, or a total of $34,306.55, but no explanation is given as to why a profit should be allowed thereon. It is plain and we have already held that the item was not covered by the Potter-Downey agreement which provided for 10 per cent profit on certain items. Plaintiff should be awarded compensation for its loss but there is no reason why it should be allowed a profit thereon and this portion of plaintiff's claim is denied. For the same reason the plaintiff can not be allowed profit on any of the disputed items herein-[fol. 84] after mentioned.

There is no exception to the finding that plaintiff expended for repairs, alterations, additions, and betterments on leased premises, used as manufacturing plants, for the purpose of expediting the production of propellers for the War Department, on contracts and orders involved herein, less a suitable proportion applicable to propellers completed and shipped, $15,583.69. These expenses were a loss to plaintiff except in so far as they facilitated work upon the propellers which were completed and paid for and for this matter a deduction is made. Plaintiff should be allowed $15,583.69 on this item.

On its claim for what it expended for machinery and equipment for the purpose of expediting the production of propellers, the plaintiff is entitled to recover the cost thereof, less a suitable deduction on account of propellers completed and delivered and a further deduction of the salvage value. Under this rule the facts found show that plaintiff is entitled to recover $22,224.35.

Another claim of plaintiff is based on the purchase and installation of twelve Cutler curtain kilns which were facilities added for the purpose of more rapidly completing the contracts, and the cost thereof, less due allowance for propellers completed and delivered, was $19,035.60. We think there is some evidence that tends to show that the market

value of these kilns after the cancellation of the contracts was only $2,600. This would be the salvage value of the property and on this basis plaintiff sustained a loss of $16,435.60, which should be allowed in computing its damages.

The claim for $851.76 for dies (see Finding 29) should be allowed plaintiff, but the item of $4,134.64 for clamps purchased in excess of normal requirements can not be allowed for the reason that the purchase was made in anticipation of further orders and contracts which never were received from the Government.

We think the plaintiff should be allowed $2,111.70 on account of extra motor trucks purchased to increase the facilities of the plant, and also $4,408.63 on account of [fol. 85] boilers and equipment used in connection therewith purchased and installed to expedite the production of propellers.

There is no claim that anything has been paid plaintiff on any of these disputed items.

The facts which support the eight items or claims made on behalf of plaintiff upon which defendant concedes plaintiff is entitled to recover are set out in Findings 18, 19, 20, 21, 22, 24, 33, and 34. The total of the items conceded in plaintiff's favor is $385,717.29. Adding this amount to the total of the amount allowed plaintiff on the disputed claims, we find that the aggregate sum allowed plaintiff is $557,304.05. From this should be deducted $437,891.01, which plaintiff concedes is due defendant for lumber. The balance, $119,413.04, is the amount we find plaintiff is entitled to recover on the various claims set out in its petition. Plaintiff claims to be entitled to interest on part of this sum, but plaintiff's recovery is not based upon a statute which awards "just compensation", and under the general rules with reference to contracts no interest can be allowed.

Defendant's Counterclaim

In the year 1924 the Commissioner of Internal Revenue made an additional assessment of income taxes against the plaintiff for the year 1918 in the amount of $191,403.77, no part of which has been paid. The counterclaim is based on this assessment. The plaintiff asserts that the assessment resulted principally from the fact that the Commissioner of Internal Revenue added large sums to plaintiff's gross

income and greatly increased its net income by refusing to allow the plaintiff to set up its closing inventory for the year in question at its then market value and by substituting in lieu thereof the cost of the inventoried articles which were purchased while this country was at war. Plaintiff further contends that when the Commissioner of Internal Revenue increases the taxpayer's closing inventory and thus increases its income for the year in question the burden is upon the defendant to establish that the change was correctly made and that as defendant has presented no evidence on this point the additional assessment must be set aside. We do not need to determine what the rule would be if the Commissioner had claimed on the trial of the case [fol. 86] that plaintiff's taxes should be larger than the amount which was assessed, or had otherwise sought to show that his ruling in the matter was incorrect, for no such claim is made here. The defendant relies on an assessment regularly made. It was the final decision of the Commissioner and it is well settled that his determination is prima facie correct. This rule is founded in reason for the taxpayer has full knowledge of all of the facts pertaining to a proper assessment while often the Government officials are without the means of obtaining proper information. A contrary rule would often put the Government at the mercy of an unscrupulous taxpayer whose dealings were not open and above board.

The plaintiff, however, insists that even if it has the burden of proof, this burden has been met and sustained by the evidence which it introduced. With this conclusion we do not agree, but, on the contrary, have found that the evidence in the case is not sufficient to enable a calculation of plaintiff's taxes to be made except by using the Commissioner's computation as a basis. This conclusion, however, does not, in our opinion, prevent corrections being made in definite and specific items where it is shown that the Commissioner's action was erroneous, and the same rule applies to inventories.

The plaintiff owned certain valuable patents which it had acquired by issuing stock of the par value of $107,100 therefor. As the evidence shows that the stock was worth par, the patents may be said to have a cash value of that amount. The Commissioner, however, did not include anything on account of the patents in the amount found by him to be the

invested capital of the plaintiff. The total amount of capital stock outstanding was $120,000. The revenue act of 1918 provided with reference to intangible property which formed a part of invested capital that the taxpayer, in making up the amount of its invested capital, might include either the actual cash value of such property, or the par value of the stock or shares issued therefor, or 25 per cent of the par value of the stock outstanding, whichever is the lowest. The taxpayer therefore was entitled to have included in its invested capital 25 per cent of the par value of [fol. 87] the total amount of the stock outstanding, which was $30,000, and this amount should be added to the amount of invested capital as found by the Commissioner.

In its return for 1918 as amended the plaintiff claimed $106,558.87 for amortization of war facilities. The Commissioner of Internal Revenue disallowed this claim and the court commissioner found that a reasonable amount for amortization was $96,788.57. It is contended on behalf of defendant that if plaintiff's damage claims based on expenses incurred and losses sustained on special facilities in the way of buildings and material acquired for the purpose of completing the contracts are allowed, plaintiff can not also have amortization for the same items.

Amortization is allowed, if at all, under the provisions of the statute (sec. 234 (a) (8), revenue act of 1918)—

in the case of buildings, machinery, equipment, or other facilities, constructed, erected, installed, or acquired, on or after April 6, 1917, for the production of articles contributing to the prosecution of the present war.

The statute further provides that—

there shall be allowed a reasonable deduction for the amortization of such part of the cost of such facilities or vessels *as has been borne by the taxpayer.* [Italics ours.]

Every item for which amortization could be properly claimed is included in the allowances already made to plaintiff for damages sustained by reason of the defendant's suspension or cancellation of the contracts, consequently the costs involved have not been borne by the taxpayer. The taxpayer has lost nothing by reason of these matters and is not entitled to amortization therefor. See A. J. Tower Co. v. Commissioner, 38 Fed. (2d) 618.

It may be argued that in the case last cited above the items of damage which also covered the matters for which plaintiff claimed amortization, had been previously allowed and determined, while in the case at bar the defendant had disputed and is still disputing the validity of these claims; and the costs or expenses which plaintiff seeks to have amortized have so far been borne by the taxpayer. We do not think a reasonable construction of the act requires that such a distinction should be made. The effect of such a [fol. 88] construction in cases like the one at bar, or in any case in which the Government did not make settlement of the damage claims within the taxable year, would be that a taxpayer would not only recover the amount of his costs and expenses as damages but receive another allowance of the same kind by way of amortization. Congress intended by the amortization provisions of the act to compensate the taxpayer for losses actually sustained and not for a cost which the courts order repaid to him. We think the words "borne by the taxpayer" mean that the taxpayer on the final adjudication of his account with the Government sustains the burden of the costs and expenses which he seeks to have amortized. What is said in U. S. Cartridge Co. v. United States, 284 U. S. 511, as to the difference between obsolescence and amortization has no application here.

Plaintiff also contends that in computing its net income for 1918 the Commissioner erred in using the cost price as the value of the lumber on hand which was included in its closing inventory. Plaintiff claims that the market price at the close of the year should have been used instead and asks to have a deduction made from the inventory of the difference between the cost and market price of the lumber. We do not understand on what theory the Commissioner based his action. In one division of the argument, defendant assumes that the lumber never was the property of plaintiff, but if this were so it is manifest that nothing should be included in the inventory on account of it. We do not need, however, to consider this assumption as it is entirely inconsistent with the position of both parties. The facts are that the defendant furnished the plaintiff with a large quantity of walnut lumber and made a charge against plaintiff for it. This charge and the amount thereof is conceded by plaintiff. After the contracts were canceled, defendant removed or took back the unused portion of the

lumber and plaintiff claims a credit on account of this action. This credit and the amount thereof is conceded by defendant and we have followed these concessions in determining the amount which plaintiff is entitled to recover. On this basis, defendant again objects on the ground that plaintiff has been allowed a credit for the lumber returned and having lost nothing by reason of the defendant having [fol. 89] taken back the unused lumber it is not entitled to any amortization thereon. But this is not an amortization item. It is a matter of inventory and the question is, What was the amount of plaintiff's inventory at the close of the year 1918? At that time defendant had not taken back the lumber and plaintiff had no assurance that defendant would take it back and give a credit for the lumber thus returned. The case of U. S. Cartridge Co., supra, involved a similar situation. In that case, as in the case now before us, the Government subsequently took back certain property or made settlement for it, but the Supreme Court decided that the closing inventory of the taxpayer should be based on the market value of the property then held by it during the tax year under consideration. Following the decision in this case, a correction should be made in the calculation of the tax by the Commissioner of Internal Revenue by deducting from the amount of the inventory as found by him the difference between the market value of the lumber then held by the taxpayer and the cost price thereof as used by the Commissioner. This difference is $108,477.98.

Another correction should be made in the Commissioner's calculation of the tax for 1918. In determining the amount of net income he fixed the value of what have been called by both parties "general stores" in the closing inventory at cost when it should have been fixed at the market value. This made a difference of $23,442.50, for which plaintiff is entitled to a deduction from the amount of net income fixed by the Commissioner.

The Commissioner, in computing the net income of plaintiff for 1918, included in the inventory $42,421.68 for purchases which he found to have been erroneously not capitalized. Plaintiff claims this was an error but no satisfactory evidence has been presented to support this claim and it is disallowed.

After making the corrections in invested capital and net income as stated above, we find that the 1918 tax of plaintiff

should be computed on the basis of $103,071.67 as the invested capital and $171,546.00 as the net income. Making the calculation on this basis, we find that the excess profits tax of plaintiff for 1918 is $100,916.17 and its income tax, [fol. 90] $8,235.58, making a total of $109,151.75. Plaintiff paid on its tax for that year $48,778.31. The tax was therefore underpaid in the sum of $60,373.44.

The circumstances of the case cause the question to arise as to whether the defendant should be allowed interest on the deficiency for 1918. We have already found and determined that at the close of 1918 defendant was indebted to plaintiff on the matters which form the basis of plaintiff's suit in a sum much larger than the amount of this tax, but we have also decided that plaintiff could not be allowed any interest thereon. The statute provides for interest on the tax from the time it was assessed, and it may seem quite inequitable that the defendant should be allowed interest on the amount of this tax for a number of years during all of which it was indebted to the plaintiff. If the case were between private individuals to be decided upon their respective claims such a result would not follow; but, as was said in United States v. Verdier, 164 U. S. 213, 218:

* * * we are unable to see how the fact that there were mutual claims can authorize us to disregard the plain letter of the statutes.

In the case last cited, each party had claims against the other. The Government first established its claims and in another case obtained a judgment against Verdier which under the statute drew interest. Verdier then brought suit in the Court of Claims to recover a portion of his salary due him by readjustment under a special statute. The Court of Claims found that the Government was indebted to Verdier at the time it obtained its judgment although the amount had not then been ascertained in a sum greater than the amount owed by Verdier to the Government. As the law did not permit Verdier to be allowed any interest, the Court of Claims held that it would be inequitable to allow the Government interest and entered its judgment accordingly. When the case came before the Supreme Court on appeal that court said:

It would certainly seem to be equitable that, if the government were indebted to Verdier at the time it obtained judg-

ment against him, it should not charge him with interest upon its judgment. But interest being a matter of purely statutory regulation, we are bound to give or withhold it as the statute directs.

[fol. 91] The court also said:

An inherent vice of petitioner's argument is in the assumption that he and the government stand upon an equality with respect to interest. The truth is that in its dealings with individuals public policy demands that the government should occupy an apparently favored position. It may sue, but, except by its own consent, cannot be sued. In the matter of costs it recovers but does not pay, and the liability of the individual would not be affected by the fact he had a judgment against the government which did not carry costs. (Citing many cases previously decided by the Supreme Court.)

While the case last cited does not involve a claim for taxes, the principles laid down in its decision apply here. Interest will be computed on the amount of plaintiff's tax for 1918 at six per cent from June 14, 1924, when the Commissioner made the additional assessment, to the date of the judgment herein, April 6, 1936. The interest so computed is $42,784.64, which added to the amount of the underpayment of the tax makes a total of $103,158.08 due defendant upon its counterclaim. Subtracting this from the amount which we have found plaintiff is entitled to recover on the cause of action set out in its petition, the balance in favor of plaintiff is $16,254.96 for which judgment will be entered in its favor accordingly.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 92]

XI. Judgment

At a Court of Claims held in the City of Washington on the 5th day of October, A. D., 1936, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the defendant is entitled to recover.

It is Therefore Ordered and Adjudged that the defendant do have and recover of and from the plaintiff the sum of twenty-one thousand eight hundred ninety-five dollars and eighty-nine cents ($21,895.89) with interest as provided by law from April 6, 1936, being the date when the former judgment was entered.

[fol. 93] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 41,145. Court of Claims. Term No. 605. American Propeller and Manufacturing Company, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed December 29, 1936. Term No. 605, O. T., 1936.

[fol. 94] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 15, 1937

The petition herein for a writ of certiorari to the Court of Claims is granted, limited to the question of the allowance of interest to the Government upon its claim.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 605

AMERICAN PROPELLER AND MANUFACTURING COMPANY, A CORPORATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

J. KEMP BARTLETT,
EDGAR ALLAN POE,
PAUL F. MYERS,
JOHN R. YATES,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 605

AMERICAN PROPELLER AND MANUFACTURING COMPANY, A CORPORATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The American Propeller and Manufacturing Company, the petitioner herein, respectfully prays for a writ of certiorari to the Court of Claims of the United States to review a judgment in that Court, entered on October 5, 1936, and shows as follows:

A certified Transcript of Record in this case is filed herewith in accordance with Rule 41 of this Court.

I.

History of the Litigation.

On February 25, 1922, an original petition was filed by the petitioner (R. 1), and on May 7, 1935, an amended petition was filed (R. 1), alleging breach by the United States, the respondent herein, of five formal contracts entered into by it with the petitioner for the manufacture of propellers for airplanes during the emergency arising from the declaration by Congress, on April 6, 1917, that a state of war existed between the United States and the Imperial German Government.

These contracts were entered into on behalf of the respondent by officers who acted under the authority of the Secretary of War. Claims for breach by the respondent of each of these contracts were presented to the War Department during the month of September 1918, and, on or about November 22, 1918, a settlement agreement was made with the petitioner, on behalf of the respondent, by officers of the War Department, who also acted under the authority of the Secretary of War (R. 6-9). The settlement agreement, referred to as the Potter-Downey Agreement, as well as the original contracts, are all set forth in the petition and the amended petition. The settlement agreement was never performed by the respondent.

Petitioner's net claim, in the amount of $144,238.03 (R. 16), after giving respondent credit for walnut lumber furnished by it for use in the manufacture of propellers, was disputed in its entirety and testimony was offered pro and con the merits of this issue.

On May 13, 1935, the respondent filed a general traverse to the amended petition (R. 41).

On November 12, 1927, respondent filed an amended counterclaim to the original petition, including therein an in-

come and excess profits tax assessment for $191,413.04 against the petitioner for the year 1918, which assessment had been made on the 14th day of June, 1924 (R. 42).

Petitioner's replication to respondent's counterclaim (R. 43), having by leave of Court been filed on October 9, 1931, denied that any liability existed for the additional taxes sought to be imposed by said assessment, and testimony was offered pro and con this issue on the merits of the counterclaim.

The Court of Claims, on April 6, 1936, made special Findings of fact (R. 46-70), and conclusions of law (R. 70). In its opinion the Court of Claims, at page 77 of the record, said:

> "The facts which support the eight items or claims made on behalf of plaintiff upon which defendant concedes plaintiff is entitled to recover are set out in Findings 18, 19, 20, 21, 22, 24, 33 and 34. The total of the items conceded in plaintiff's favor is $385,717.29. Adding this amount to the total of the amount allowed plaintiff on the disputed claims, we find that the aggregate sum allowed plaintiff is $557,304.05. From this should be deducted $437,891.01, which plaintiff concedes is due defendant for lumber. The balance, $119,413.04, is the amount we find plaintiff is entitled to recover on the various claims set out in its petition. Plaintiff claims to be entitled to interest on part of this sum, but plaintiff's recovery is not based upon a statute which awards 'just compensation', and under the general rules with reference to contracts no interest can be allowed."

Upon respondent's counterclaim the Court of Claims, at pages 81 to 83 of the record, held:

> "After making the corrections in invested capital and net income as stated above, we find that the 1918 tax of plaintiff should be computed on the basis of $103,071.67 as the invested capital, and $171,546.00 as

the net income. Making the calculation on this basis we find that the excess profits tax of plaintiff for 1918 is $100,916.17, and its income tax $8,235.58, making a total of $109,151.75. Plaintiff paid on its tax for that year $48,778.31. The tax was therefore underpaid in the sum of $60,373.44.

"The circumstances of the case cause the question to arise as to whether the defendant should be allowed interest on the deficiency for 1918. We have already found and determined that at the close of 1918 defendant was indebted to plaintiff on the matters which form the basis of plaintiff's suit in a sum much larger than the amount of this tax, but we have also decided that plaintiff could not be allowed any interest thereon. The statute provides for interest on the tax from the time it was assessed, and it may seem quite inequitable that the defendant should be allowed interest on the amount of this tax for a number of years during all of which it was indebted to the plaintiff. If the case were between private individuals to be decided upon their respective claims, such a result would not follow; but, as was said in United States *v.* Verdier, 164 U. S., 213, 218:

"'* * * we are unable to see how the fact that there were mutual claims can authorize us to disregard the plain letter of the statutes.'

* * * * * * *

"Interest will be computed on the amount of plaintiff's tax for 1918 at six per cent from June 14, 1924, when the Commissioner made the additional assessment, to the date of the judgment herein, April 6, 1936. The interest so computed is $42,784.64, which, added to the amount of the underpayment of the tax, makes a total of $103,158.08 due defendant upon its counterclaim. Subtracting this from the amount which we have found plaintiff is entitled to recover on the cause of action set out in its petition, the balance in favor of plaintiff is $16,254.96, for which judgment will be entered in its favor accordingly."

On June 2, 1936, the petitioner filed its motion for a modification *upon the question only* of the allowance of interest upon the counterclaim of the respondent (R. 43).

On June 5, 1936, the respondent filed its motion for a new trial and with it a motion for leave to file (which leave was granted), a memorandum re judgment, accompanied by a calculation of the tax, purporting to show that the Court had made a mistake in its own calculation.

On October 5, 1936, the Court handed down a memorandum opinion, holding in part as follows:

> "The plaintiff does not now ask that interest should be computed on the amount of its recovery, but contends that so far as necessary the amount to which it was found entitled should be applied upon the tax to extinguish it, which to this extent would have the same effect as if interest were allowed. But we can find no authority for applying in payment upon a tax previously assessed the amount later allowed by the court on an unliquidated and disputed claim not relating to taxes. *The conclusion we have reached brings an inequitable result, but the inequity is not in the failure to make the credit but in not allowing interest on the plaintiff's claim.* In this matter we are compelled to follow the law as we find it. The motion of the Plaintiff must be over-ruled" (R. 45). (Italics supplied.)

The Court, upon respondent's motion, sustained the respondent's calculation of the disputed tax and found the unpaid part thereof to be the sum of $82,701.29 (R. 45), instead of $60,373.44, as originally found, and found the interest thereon to be the sum of $58,607.64 (R. 45), thus making the Court's total allowance to the respondent upon the counterclaim $141,308.93 (R. 45). The Court then deducted from the last-mentioned sum $119,413.04 (R. 45), representing the allowance it had made to the petitioner upon its claim, and extended a judgment against the petitioner for the difference so ascertained, or the sum of $21,895.89.

II.

Points Arising Upon This Record.

Upon the record the following points are presented:

1. The Court of Claims erred in holding and determining that in a case like the present one, where the disputed indebtedness of the United States to the petitioner, in an amount now for the first time liquidated, although existing since the end of the year 1918, and being, as now liquidated, larger than the indebtedness of the petitioner to the United States, for taxes based on petitioner's income for the year 1918, now also for the first time, in the same action, liquidated, does not justify or require the merger of the smaller liquidated debt into the larger liquidated debt, and the extension of a judgment for the excess of the larger over the smaller.

2. The decision of this Court in *United States* v. *William J. Verdier*, 164 U. S. 213-220, has been misconstrued by the Court of Claims, and, when properly construed, does not support the Court of Claims' decision. The decision of the Court of Claims is also contrary to the principles of law upheld and applied by the Supreme Court in the case of *District of Columbia* v. *Johnson et al.*, 165 U. S. 330.

III.

Reasons Relied on for Allowance of the Writ.

Upon the questions presented by this record, certiorari should be allowed for the following reasons:

1. The decision of the Court of Claims, allowing interest from the year 1924 (the date of the erroneous assessment) upon that portion of the respondent's counterclaim which was in litigation and unliquidated until 1936, when it was

liquidated by the judgment of the Court of Claims, in view of the facts found in this case, to wit; that from and during the entire period of time since the end of the year 1918, the respondent, as found by the Court of Claims, was indebted to the petitioner in a sum greater by $36,711.75 than the sum for which, in the same action, the Court of Claims found the petitioner was indebted to the respondent, constitutes error and involves an important question of Federal law which has not been, but should be settled by this Court.

2. The Court of Claims, in holding that the decision of this Court, in *United States* v. *William J. Verdier*, 164 U. S. 213-220, requires the allowance of interest from 1924 (the date of the erroneous assessment) on that part of respondent's counter-claim which was not liquidated until October 5, 1936, by the judgment of the Court of Claims, in view of the facts found in this case, to wit; that from and during the entire period of time since the end of the year 1918, the respondent, as found by the Court of Claims, was indebted to the petitioner in a sum greater by $36,711.75 than the sum for which, in the same action, the Court of Claims found the petitioner was indebted to the respondent, has decided an important Federal question not authorized by this Court's decision in 164 U. S., 213-220, but in a way in conflict with the applicable decisions of this Court, and has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

No judgment or decree was ever obtained by the respondent for the additional income tax it claimed until when, on October 5, 1936, the correct amount of its counter-claim was determined by the Court of Claims in an amount less than one-half of the sum assessed in 1924. The assessment was grossly erroneous and had been disputed ever

since it was made. The petitioner was entitled to its "day in court," upon the merits of the asserted tax. It is true that it finally had it, and with the result that the assessed tax was reduced by the Court of Claims from $191,403.77 (R. 42) to $82,701.29)R. 45). But meanwhile, and during every day since the end of the year 1918, respondent, as found by the Court of Claims, was indebted to the petitioner in the amount of $119,413.04 (R. 77). This claim of the petitioner against the respondent, like the respondent's claim against the petitioner, had been disputed and both were in litigation. Both were litigated in the same action and their liquidation was accomplished through one and the same judgment in the Court of Claims, this being the judgment the review of which is here sought.

WHEREFORE your petitioner prays that a writ of certiorari issue, under the seal of this Court, directed to the United States Court of Claims, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Claims had in the case numbered and entitled on its docket "B-28, American Propeller & Manufacturing Company, a corporation, petitioner, *v.* The United States, respondent", to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Court of Claims be reversed by the Court; and for such further relief as to this Court may seem proper.

J. KEMP BARTLETT,
EDGAR ALLAN POE,
PAUL F. MYERS,
JOHN R. YATES,
Counsel for Petitioner.

Dated at Baltimore, Maryland, December 23d, 1936.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Claims of the United States is reported in 15 Fed. Supp., at page 168, etc., and the Court's order of Oct. 5, 1936, modifying the judgment, will be found at page 44 of the record.

Jurisdiction.

The judgment of the Court of Claims of the United States, now sought to be reversed, was entered on October 5, 1936 (R. 83). The jurisdiction of this Court is invoked under the Act of Congress of February 13, 1925, Chap. 229, 43 Stat. at L. 936.

The decision of this Court, which, it is believed, sustains said jurisdiction, is *Colgate* v. *United States*, 280 U. S. 43-49.

Statement.

This has already been stated in the petition, under "History of the Litigation" (Petition 2-5), which is hereby adopted and made a part of this brief.

Specification of Errors.

1. The Court of Claims erred in holding and determining that in a case like the present one, where the disputed indebtedness of the United States to the petitioner, in an amount now for the first time liquidated, although existing since the end of the year 1918, and being, as now liquidated, larger than the indebtedness of the petitioner to the United States, for taxes based on petitioner's income for the year 1918, now also for the first time liquidated in the same

action, does not justify or require the merger of the smaller liquidated debt into the larger liquidated debt, and the extension of a judgment for the excess of the larger over the smaller.

2. The decision of this Court, in *United States* v. *William J. Verdier*, 164 U. S. 213-220, has been misconstrued by the Court of Claims, and, when properly construed, does not support the Court of Claims' decision. The decision of the Court of Claims is also contrary to the principles of law upheld and applied by the Supreme Court in the case of *District of Columbia* v. *Johnson et al.*, 165 U. S. 330.

Argument.

The above specifications of errors will be argued together. We respectfully submit that the case of *United States* v. *Verdier*, 164 U. S. 213, which the Court of Claims treated as controlling, differs very materially from the case at bar. Two separate suits were there involved. James R. Verdier was a duly qualified postmaster of Beaufort, South Carolina, from July 1, 1866, to April 30, 1869. Upon his retirement from office he appeared as indebted to the United States, on the face of his postal accounts. On June 28, 1870, an action was brought by the United States against him on his official bond, in the United States District Court for the District of South Carolina, to recover his alleged indebtedness. There was a verdict against Verdier, which verdict was, upon motion of his attorney, set aside. The second trial resulted also in a verdict against him, and on January 25, 1871, judgment was entered thereon for $1,059.93. On November 3, 1885, application was made to the Postmaster General by Verdier's Administrator, for a re-adjustment of decedent's salary as postmaster under the provisions of the Act of March 3, 1883 (22 Stat. at L., 487), and on December 23, 1885, said salary was re-adjusted and the sum

of $2,892.84 found due decedent's estate. On August 4, 1886, a sum of money was appropriated by Congress to pay this allowance. Meanwhile, of course, interest had been running on the judgment that the United States had secured against James R. Verdier on January 25, 1871. The interest on this judgment, down to August 4, 1886, the date of the appropriation by Congress, and the costs of suit, added to the original judgment, aggregated the sum of $2,296.77. This latter sum was deducted from the amount of the re-adjusted salary, which left a balance of $596.07.

The administrator of Verdier contended that, inasmuch as under the salary adjustment of December 23, 1885, the United States owed the decedent $2,892.84, only the principal amount of the judgment should be deducted from this sum, instead of the judgment with interest, as was actually done.

This Court decided against the contention of the administrator of the Verdier estate, and, although in the course of its opinion, it did use the language quoted by the Court of Claims, it also stated as follows:

> "Nor is it strictly true to say that the Government was indebted to Verdier at the date of its judgment against him. He had performed services for which an indebtedness was subsequently *voluntarily* created by the Government, but until readjustment was made the law imposed no obligation upon the Government to pay him an increased salary. *Verdier could not have availed himself of it as a set-off or counterclaim to his own debt to the Government,* and in fact it never became a debt until the claim was liquidated under the Act of 1883." (Italics supplied.)

Furthermore, this Court, in its opinion in the *Verdier* case, makes it clear that under the Acts of Congress, which regulated the compensation of postmasters during the lifetime of Verdier, a salary re-adjustment "operated *pros-*

pectively only", and that it was not until the Act of 1883 was passed that the Postmaster General was authorized to re-adjust the compensation of postmasters so as to "make such re-adjustments *retrospective*". (Italics supplied.)

On the subject of interest upon the judgment against Verdier this Court said:

> "By U. S. Rev. Stat. Sec. 966, 'interest shall be allowed on all judgments in civil causes recovered in a Circuit or District Court in all cases where, by the law of the State in which such Court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as allowed by law on judgments recovered in the Courts of such State'. We see no reason why this Section, or Section 3624, fixing the rate of interest upon delinquent accounts of public officers at 6%, does not apply to this case. Verdier was therefore properly charged with interest upon the judgment."

During the time of service of Verdier, and, in fact, during his lifetime, the Acts of Congress which authorized, in certain cases, the re-adjustment of postmasters' salaries, were the Acts of 1864 and 1866 (Act of July 1, 1864 (13 Stat. at L. 335), and Act of July 12, 1866 (14 Stat. at L. 59 and 60)), and, as is stated in this Court's opinion in the *Verdier* case and also in the case of *United States* v. *McLean*, 95 U. S. 750, both of these Acts were *prospective* in their operation and *not retroactive*, and under each of them it was held that no re-adjustments could be made until after sworn applications had been filed with the Postmaster General, showing certain facts that under these two Acts were conditions precedent to any re-adjustment of compensation.

Verdier never made application for re-adjustment of his compensation under either of these Acts. He died prior to the passage of the Act of March 3, 1883 (22 Stat. at L.

487), which was the earliest Act authorizing retroactive re-adjutsments of postmasters' compensation, but which, like the former Acts, required sworn applications to be made setting forth certain facts which, by the terms of the Act, were made conditions precedent to the granting of any benefits thereunder. As was said by this Court in the *Verdier* case:

> "By the Act of 1883 no re-adjustment could be made except upon the application of the postmaster, and when that application was made in this case, the salary was, for the first time, re-adjusted. Until this time the debt was not liquidated * * * in fact, it would be more accurate to say that it did not exist."

In the case at bar no judgment was ever entered against the American Propeller and Manufacturing Company for the amount of the deficiency tax, as found by the Court of Claims, but, on the contrary, the American Propeller and Manufacturing Company was entitled to avail itself, as a set-off or counterclaim against the correct amount of the tax, such portion of its claim against the Government as was sufficient to wipe out the tax. The correct amount of the tax was $82,701.29, as found by the Court of Claims, and the correct amount of the Government's indebtedness was $119,413.04, as found by the Court of Claims in the same suit, to have been due and owing since the end of 1918. Both amounts being due, as of the same year, and the difference between the two amounts being a balance of $36,711.75 in favor of the American Propeller and Manufacturing Company, it follows that there never was a time when the American Propeller and Manufacturing Company was actually indebted to the United States. This was not the situation in the *Verdier* case. The American Propeller and Manufacturing Company *is not asking for interest on this balance of $36,711.75 that has been due it by the United*

States ever since the year 1918, but only asks that the amount representing this indebtedness of the United States to it be paid, *without interest.* This request violates no statutes of the United States or policy of the United States in the matter of the payment of claims due by it to its citizens. On the contrary, the failure to make such payment would seem to violate every principle of fair dealing and justice. Federal statutes make ample provision for the crediting of overpayment of taxes against a deficiency assessment. Here, instead of there being an overpayment of taxes by the American Propeller and Manufacturing Company, to be credited against a deficiency assessment, there is a finding by the Court of Claims of an actual indebtedness by the United States to the American Propeller and Manufacturing Company of $119,413.04 as of 1918, representing money spent by the American Propeller and Manufacturing Company for the use and benefit of the United States in the prosecution of the World War. Moreover, as of 1918, the American Propeller and Manufacturing Company owed the United States *only* $82,701.29 (the matter of interest not arising or being involved until 1924), and as an off-set to this indebtedness there was then, in 1918, due the American Propeller and Manufacturing Company by the United States $119,413.04, leaving a net indebtedness of $36,711.75 due the American Propeller and Manufacturing Company by the United States, thus completely wiping out the claim of the United States. In 1924 there was no indebtedness due by the American Propeller and Manufacturing Company to the United States to which interest could properly attach or be added.

The United States Statute relating to the addition of interest upon an assessment for taxes from the date of the assessment should be given a fair and reasonable interpretation, and not one that brings about a manifest injustice

and wrong. It was designed to produce the prompt payment of taxes admittedly due by imposing a penalty upon those wrongfully withholding payment.

The petitioner is here being penalized, not because of any wrong-doing or negligence on its part, but because of error and wrong on the part of the United States Government representatives. Payment of a just claim of the petitioner, in the amount of $119,413.04, as finally determined by the Court of Claims, has not only been withheld and refused by the United States since 1918, but after improperly and unjustly withholding such payment for a period of six years, the Government then, in 1924, for the first time asserted a tax claim for the year 1918 against the petitioner for the very large and erroneous amount of $191,403.77.

The Court of Claims finally, after a lapse of many years, found this belated claim to be erroneous and unwarranted to the extent of $108,711.75.

The erroneous contentions of the Governmnet not only resulted in withholding from the petitioner $119,413.04 which should have been paid the petitioner in 1918, but compelled the petitioner to resist the improper and excessive demand of the Government for taxes. Moreover, the improper withholding by the Government from the petitioner during all of these years of the large sum of money justly due the petitioner, made it impossible for the petitioner to pay, in the first instance, the unjust and excessive demand of the Government for taxes, or any part thereof, or even the part afterwards found to be due, and then seek to recover back the amount that might be held thereafter to have been improperly collected.

The petitioner, therefore, resorted to the only course open to it, namely, its suit in the Court of Claims. In this suit the Government filed as a counterclaim the erroneous and excessive assessment of additional income taxes for the

year 1918 in the amount of $191,403.77. The case then proceeded in regular course and the Court of Claims found that there was justly due the petitioner, by the United States, as of the end of the year 1918, $119,413.04, and that as of the same date the petitioner owed the Government, for additional taxes for the year 1918, $82,701.29, a difference in favor of the petitioner of $36,711.75.

As of that date, therefore, namely, 1918, no question of interest was involved, and as the amount found to be due the petitioner by the Government was in excess of the amount found to be due the Government by the petitioner, and as these findings were by the same Court, at one and the same time, in one and the same suit, the petitioner should, in equity, fairness and justice, be entitled to a judgment for the excess, to wit, $36,711.75.

Under the judgment of the Court of Claims complained of, the United States, by improperly withholding from the petitioner, for eighteen years, what was justly due it, and at the same time asserting an unjust and excessive claim for additional taxes, has succeeded not only in liquidating its own debt of $36,711.75 by no payment whatsoever thereon, but has made the petitioner its debtor in the amount of $21,895.89.

Under the authority of the language used by this Court in the *Verdier* case, and above quoted, it would appear to be established that if the Government had brought suit against the American Propeller and Manufacturing Company for $191,403.77, the amount of the additional income tax for 1918 assessed against it, the American Propeller and Manufacturing Company could have availed itself of its claim against the Government as a set-off or counterclaim. Here the situation is merely reversed. In the suit of the American Propeller and Manufacturing Company against the United States, the United States set up its tax

claim against the American Propeller and Manufacturing Company as a set-off or counterclaim, so here again the case at bar differs most materially from the *Verdier* case.

We are asking this Court to apply to the present case the principles it applied in the case of *District of Columbia* v. *Johnson*, 165 U. S. 330. There the District of Columbia, appellant, was endeavoring to off-set against the claim of the claimant, the appellee, interest for a number of years on a counterclaim that had been found by the Referee in favor of the District of Columbia, but which counterclaim was wiped out by the Act of Congress of February 13, 1895 (28 Stat. at L. 664), as found by this Court. The Court of Claims had adopted the contention of the District of Columbia. This Court, in passing upon the matter, said as follows:

> "The claim of the Appellant to off-set against any recovery here the amount of the interest from June 1, 1874, on its counterclaim found due in its favor against the claimants, in the report of the referee, we think cannot be admitted. The effect of the passage of the Act of 1895 is, in substance, the same as if the counterclaim, which is the principal sum, had been paid, and when that is the case the interest becomes thereby extinguished."

So in the case at bar the Court of Claims found that although as of 1918 the American Propeller and Manufacturing Company owed the United States $82,701.29, the United States, as of the same date, owed the American Propeller and Manufacturing Company more than $82,701.29, to wit, $119,413.04. The effect of these findings of the Court of Claims, to use the language of this Court just quoted, is "in substance the same as if the counterclaim, which is the principal sum, had been paid, and when that is the case the interest becomes thereby extinguished."

The position of the American Propeller and Manufacturing Company is, moreover, much stronger than that of the appellee in the *Johnson* case, because in the *Johnson* case the wiping out of the counterclaim of the District of Columbia, by the Act of 1895, was a *mere gratuity*, as was also true in the *Verdier* case, so far as the allowance of adjusted compensation under the Act of 1883 (22 Stat. at L. 487), is concerned, whereas, here the counterclaim of the United States was wiped out and paid by an actual credit on an actual indebtedness of the United States to the petitioner, and, in addition, the petitioner was never, at any time, actually indebted to the United States upon a proper statement of the account between them, and hence there was never any indebtedness of the petitioner to which interest could properly attach.

It is respectfully submitted, therefore, that the Court of Claims erred in not entering a judgment in favor of the American Propeller and Manufacturing Company in the amount of $36,711.75, instead of a judgment against the American Propeller and Manufacturing Company in the amount of $21,895.89, and that the writ of certiorari prayed for should accordingly issue.

Respectfully submitted,

J. Kemp Bartlett,
Edgar Allan Poe,
Paul F. Myers,
John R. Yates,
Counsel for Petitioner.

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No. 605.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

AMERICAN PROPELLER AND MANUFACTURING COMPANY, *Petitioner*,

v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF AMERICAN PROPELLER AND MANUFACTURING COMPANY.

J. KEMP BARTLETT,
EDGAR ALLAN POE,
PAUL F. MYERS,
JOHN R. YATES,

Counsel for Petitioner.

King Bros., Inc., Printers, 208 N. Calvert St., Baltimore, Md.

IN THE

Supreme Court of the United States

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v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF AMERICAN PROPELLER AND MANUFACTURING COMPANY.

In the brief filed on behalf of the United States (page 6), Counsel for the United States, while admitting that under the authority of Ford Motor Co. v. United States, 9 F. Supp. 590, 602 (C. Cls.), in which case *certiorari* was denied by this Court, 296 U. S. 636, and of Standard Oil Co. v. United States, 10 F. Supp. 550, 562 (C. Cls.) interest should not have been allowed by the Court of Claims on the deficiency tax claim of The United States against American Propeller and Manufacturing Company, nevertheless contend that those cases and the decisions therein are not applicable here because the Peti-

tioner has not specially and expressly set up, in its petition for a *writ of certiorari*, this precise error as one of the reasons why the writ should be granted.

We respectfully submit that this contention of the Counsel for the United States is untenable.

The question before this Court, on the pending petition, is whether the Court of Claims *erred in allowing interest* on the Government's counterclaim against the Petitioner, based upon the *deficiency assessment*.

The writ should manifestly be granted if it is evident to this Court, for any reason appearing upon the face of the record that interest was improperly allowed; otherwise the Court would be denying redress to the Petitioner, although its right to redress was apparent. As interest was improperly allowed, the writ should be granted.

J. KEMP BARTLETT,
EDGAR ALLAN POE,
PAUL F. MYERS,
JOHN R. YATES,

Counsel for Petitioner.

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No. 605

AMERICAN PROPELLER AND MANUFACTURING COMPANY, A CORPORATION,

Petitioner,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF ON BEHALF OF PETITIONER.

J. KEMP BARTLETT,
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Supreme Court of the United States

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No. 605

AMERICAN PROPELLER AND MANUFACTURING COMPANY, A CORPORATION,

Petitioner,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF ON BEHALF OF PETITIONER.

I.

History of the Litigation.

On February 25, 1922, an original petition was filed by the petitioner (R. 1), and on May 7, 1935, an amended petition was filed (R. 1), alleging breach by the United States, the respondent herein, of five formal contracts entered into by it with the petitioner for the manufacture of propellers for airplanes during the emergency arising from the declaration by Congress, on April 6, 1917, that a

state of war existed between the United States and the Imperial German Government.

These contracts were entered into on behalf of the respondent by officers who acted under the authority of the Secretary of War. Claims for breach by the respondent of each of these contracts were presented to the War Department during the month of September, 1918, and, on or about November 22, 1918, a settlement agreement was made with the petitioner, on behalf of the respondent, by officers of the War Department, who also acted under the authority of the Secretary of War (R. 6-9). The settlement agreement, referred to as the Potter-Downey Agreement, as well as the original contracts, are all set forth in the petition and the amended petition. The settlement agreement was never performed by the respondent.

Peitioner's net claim, in the amount of $144,238.03 (R. 16), after giving respondent credit for walnut lumber furnished by it for use in the manufacture of propellers, was disputed in its entirety and testimony was offered pro and con the merits of this issue.

On May 13, 1935, the respondent filed a general traverse to the amended petition (R. 41).

On November 12, 1927, respondent filed an amended counterclaim to the original petition, including therein a deficiency income and excess profits tax assessment for $191,413.04 against the petitioner for the year 1918, which assessment had been made on the 14th day of June, 1924 (R. 42).

Petitioner's replication to respondent's counterclaim (R. 43), having by leave of Court been filed on October 9, 1931, denied that any liability existed for the additional taxes sought to be imposed by said assessment, and testimony was offered pro and con this issue on the merits of the counter-claim.

The Court of Claims, on April 6, 1936, made special Findings of fact (R. 46-70), and conclusions of law (R.

70). In its opinion the Court of Claims, at page 77 of the record, said:

> "The facts which support the eight items or claims made on behalf of plaintiff upon which defendant concedes plaintiff is entitled to recover are set out in Findings 18, 19, 20, 21, 22, 24, 33 and 34. The total of the items conceded in plaintiff's favor is $385,717.29. Adding this amount to the total of the amount allowed plaintiff on the disputed claims, we find that the aggregate sum allowed plaintiff is $557,304.05. From this should be deducted $437,891.01, which plaintiff concedes is due defendant for lumber. The balance, $119,413.04, is the amount we find plaintiff is entitled to recover on the various claims set out in its petition. Plaintiff claims to be entitled to interest on part of this sum, but plaintiff's recovery is not based upon a statute which awards 'just compensation', and under the general rules with reference to contracts no interest can be allowed."

Upon respondent's counterclaim the Court of Claims, at pages 81 to 83 of the record, held:

> "After making the corrections in invested capital and net income as stated above, we find that the 1918 tax of plaintiff should be computed on the basis of $103,071.67 as the invested capital, and $171,546.00 as the net income. Making the calculations on this basis we find that the excess profits tax of plaintiff for 1918 is $100,916.17, and its income tax $8,235.58, making a total of $109,151.75. Plaintiff paid on its tax for that year $48,778.31. The tax was therefore underpaid in the sum of $60,373.44.
>
> "The circumstances of the case cause the question to arise as to whether the defendant should be allowed interest on the deficiency for 1918. We have already found and determined that at the close of 1918 defendant was indebted to plaintiff on the matters which form the basis of plaintiff's suit in a sum much larger than the amount of this tax, but we have also decided that plaintiff could not be allowed any interest thereon. The statute provides for interest on the tax from the time it was assessed, and it may

seem quite inequitable that the defendant should be allowed interest on the amount of this tax for a number of years during all of which it was indebted to the plaintiff. If the case were between private individuals to be decided upon their respective claims, such a result would not follow; but, as was said in United States *v.* Verdier, 164 U. S., 213, 218:

"'* * * we are unable to see how the fact that there were mutual claims can authorize us to disregard the plain letter of the statutes.'

* * * * * * *

"Interest will be computed on the amount of plaintiff's tax for 1918 at six per cent from June 14, 1924, when the Commissioner made the additional assessment, to the date of the judgment herein, April 6, 1936. The interest so computed is $42,784.64 which, added to the amount of the underpayment of the tax, makes a total of $103,158.08 due defendant upon its counter-claim. Subtracting this from the amount which we have found plaintiff is entitled to recover on the cause of action set out in its petition, the balance in favor of plaintiff is $16,254.96, for which judgment will be entered in its favor accordingly."

On June 2, 1936, the petitioner filed its motion for a modification *upon the question only* of the allowance of interest upon the counterclaim of the respondent (R. 43).

On June 5, 1936, the respondent filed its motion for a new trial and with it a motion for leave to file (which leave was granted), a memorandum re judgment, accompanied by a calculation of the tax, purporting to show that the Court had made a mistake in its own calculation.

On October 5, 1936, the Court handed down a memorandum opinion, holding in part as follows:

"The plaintiff does not now ask that interest should be computed on the amount of its recovery, but contends that so far as necessary the amount to which it was found entitled should be applied upon the tax to extinguish it, which to this extent would have the same effect as if interest were allowed. But we can find no authority for applying in payment

upon a tax previously assessed the amount later allowed by the court on an unliquidated and disputed claim not relating to taxes. *The conclusion we have reached brings an inequitable result, but the inequity is not in the failure to make the credit but in not allowing interest on the plaintiff's claim.* In this matter we are compelled to follow the law as we find it. The motion of the Plaintiff must be over-ruled" (R. 45). (Italics supplied.)

The Court, upon respondent's motion, sustained the respondent's calculation of the disputed tax and found the unpaid part thereof to be the sum of $82,701.29 (R. 45), instead of $60,373.44, as originally found, and found the interest thereon to be the sum of $58,607.64 (R. 45), thus making the Court's total allowance to the respondent upon the counterclaim $141,308.93 (R. 45). The Court then deducted from the last-mentioned sum $119,413.04 (R. 45), representing the allowance it had made to the petitioner upon its claim, and extended a judgment against the petitioner for the difference so ascertained, or the sum of $21,895.89.

Opinion Below.

The opinion of the Court of Claims of the United States is reported in 14 Fed. Supp., at pages 168, etc., and the Court's order of Oct. 5, 1936, modifying the judgment, will be found at page 44 of the record.

II.

Argument.

The question, and the sole question before the Court, is "Did the Court of Claims err in allowing interest on the $82,701.29 found by the Court of Claims to be due The United States by the American Propeller and Manufacturing Company as an additional income and excess profit tax for the year 1918?"

The amount of interest allowed by the Court of Claims on the sum of $82,701.29 was $58,607.64, being interest at six per cent. from June 14, 1924, the date when the Commissioner made the erroneous assessment of $191,403.77 down to April 6, 1936, the date of the judgment herein.

On behalf of the petitioner it is respectfully submitted that the allowance of said interest under all the facts and circumstances of this case constitutes reversible error.

There is no dispute about the facts.

The petitioner brought suit in the Court of Claims on February 25, 1922, against the United States, alleging breach by the United States of five formal contracts entered into by it with the petitioner for the manufacture of propellers for airplanes after the United States entered the World War. In this suit the petitioner claimed that $144,238.03 was due it by the United States. On November 12, 1927, The United States filed a counterclaim, including therein a deficiency income and excess profit tax assessment for $191,403.77, for the year 1918, which deficiency assessment had been made by the Commissioner on the fourteenth day of June, 1924. The case being at issue the Court of Claims had before it, for determination, the petitioner's claim of $144,238.03 and the United States' counterclaim of $191,403.77.

The Court of Claims found that the United States was indebted to the petitioner, as of the year 1918, in the sum of $119,413.04 (R. 77). It also finally found that the amount of additional income and excess profit tax due by the petitioner for the year 1918 was $82,701.29 instead of $191,403.77, the deficiency tax as originally assessed against the petitioner by the Commissioner on June 14, 1924 (R. 45). The Court of Claims instead of entering up judgment for the petitioner for $36,711.75, the amount by which the claim of the petitioner against the United States, as found by the Court of Claims exceeded the claim of the United States against the petitioner, as found by the Court of Claims, entered judg-

ment in favor of the United States against the petitioner in the amount of $21,895.89, the difference representing the interest item of $58,607.64 above mentioned.

The Court of Claims in its opinion, in explanation and justification of its action said:

> "We can find no authority for applying in payment upon a tax previously assessed the amount later allowed by the Court on an unliquidated and disputed claim not relating to taxes. The conclusion we have reached brings an inequitable result, but the inequity is not in the failure to make the credit but in not allowing interest on the plaintiff's claim In this matter we are compelled to follow the law as we find it." (Rec. page 45).

The Court of Claims based its decision upon the case of United States v. Verdier, and in its opinion quoted certain language appearing therein (R. 81 to 83).

We respectfully submit that that case differs very materially from the case at bar, and when carefully analyzed will be found not to be controlling.

Two separate suits were there involved. James R. Verdier was a duly qualified postmaster of Beaufort, South Carolina, from July 1, 1866, to April 30, 1869. Upon his retirement from office he appeared as indebted to the United States, on the face of his postal accounts. On June 28, 1870, an action was brought by the United States against him on his official bond, in the United States District Court for the District of South Carolina, to recover his alleged indebtedness. There was a verdict against Verdier, which verdict was, upon motion of his attorney, set aside. The second trial resulted also in a verdict against him, and on January 25, 1871, judgment was entered thereon for $1,059.93. On November 3, 1885, application was made to the Postmaster General by Verdier's Administrator, for a re-adjustment of decedent's salary as postmaster under the provisions of the Act of March 3, 1883 (22 Stat. at L., 487), and on December 23,

1885, said salary was re-adjusted and the sum of $2,892.84 found due decedent's estate. On August 4, 1886, a sum of money was appropriated by Congress to pay this allowance. Meanwhile, of course, interest had been running on the judgment that the United States had secured against James R. Verdier on January 25, 1871. The interest on this judgment, down to August 4, 1886, the date of the appropriation by Congress, and the costs of suit, added to the original judgment, aggregated the sum of $2,296.77. This latter sum was deducted from the amount of the readjusted salary, which left a balance of $596.07.

The administrator of Verdier contended that, inasmuch as under the salary adjustment of December 23, 1885, the United States owed the decedent $2,892.84, only the principal amount of the judgment should be deducted from this sum, instead of the judgment with interest, as was actually done.

This Court decided against the contention of the administrator of the Verdier estate, and, although in the course of its opinion, it did use the language quoted by the Court of Claims, it also stated as follows:

> "Nor is it strictly true to say that the Government was indebted to Verdier at the date of its judgment against him. He had performed services for which an indebtedness was subsequently *voluntarily* created by the Government, but until readjustment was made the law imposed no obligation upon the Government to pay him an increased salary. *Verdier could not have availed himself of it as a set-off or counterclaim to his own debt to the Government*, and in fact it never became a debt until the claim was *and in fact it never became a debt until the claim was liquidated under the Act of* 1883." (Italics supplied.)
>
> * * * * *
>
> "By the Act of 1883 no re-adjustment could be made except upon the application of the postmaster, and when that application was made in this case, the salary was, for the first time, re-adjusted. Until

this time the debt was not liquidated * * * in fact, it *would be more accurate to say that it did not exist.*" (Italics supplied.)

In the case at bar no judgment was ever entered against the American Propeller and Manufacturing Company for the amount of the deficiency tax, as found by the Court of Claims, but, on the contrary, the American Propeller and Manufacturing Company was entitled to avail itself, as a set-off or counterclaim against the correct amount of the tax, of such portion of its claim against the Government as was sufficient to wipe out the tax. The *correct* amount of the tax was $82,701.29, as found by the Court of Claims, and the *correct* amount of the Government's indebtedness was $119,413.04, as also found by the Court of Claims in the same suit, to have been due and owing since the end of 1918. Both amounts being due, as of the same year, and the difference between the two amounts being a balance of $36,711.75 in favor of the American Propeller and Manufacturing Company, it follows that there never was a time when the American Propeller and Manufacturing Company was actually indebted to the United States. This was not the situation in the *Verdier* case. The American Propeller and Manufacturing Company *is not asking for interest on this balance of $36,711.75 that has been due it by the United States ever since the year 1918*, but only asks that the amount representing this indebtedness of the United States to it be paid, *without interest*. This request violates no statutes of the United States or policy of the United States in the matter of the payment of claims due by it to its citizens. On the contrary, the failure to make such payment would seem to violate every principle of fair dealing and justice. Federal statutes make ample provision for the crediting of overpayment of taxes against a deficiency assessment. Here, instead of there being an overpayment of taxes by the American Propeller and Manufacturing Company, to be credited against a deficiency assessment, there is a finding by the

Court of Claims of an actual indebtedness by the United States to the American Propeller and Manufacturing Company of $119,413.04 as of 1918, representing money spent by the American Propeller and Manufacturing Company for the use and benefit of the United States in the prosecution of the World War. Moreover, as of 1918, the American Propeller and Manufacturing Company owed the United States *only* $82,701.29 (the matter of interest not arising or being involved until 1924), and as an off-set to this indebtedness there was then, in 1918, due the American Propeller and Manufaturing Company by the United States $119,413.04, leaving a net indebtedness of $36,711.75 due the American Propeller and Manufacturing Company by the United States, thus completely wiping out the claim of the United States. In 1924 there was no indebtedness due by the American Propeller and Manufacturing Company to the United States to which interest could properly attach or be added.

The United States Statute relating to the addition of interest upon an assessment for taxes from the date of the assessment should be given a fair and reasonable interpretation, and not one that brings about a manifest injustice and wrong. It was designed to produce the prompt payment of taxes admittedly due by imposing a penalty upon those wrongfully withholding payment.

The petitioner is here being penalized, not because of any wrong-doing or negligence on its part, but because of error and wrong on the part of the United States Government representatives. Payment of a just claim of the petitioner, in the amount of $119,413.04, as finally determined by the Court of Claims, has not only been withheld and refused by the United States since 1918, but after improperly and unjustly withholding such payment for a period of six years, the Government then, in 1924, for the first time asserted a tax claim for the year 1918 against the petitioner for the very large and erroneous amount of $191,403.77.

The Court of Claims finally, after a lapse of many years, found this belated claim to be erroneous and unwarranted to the extent of $108,711.75.

The erroneous contentions of the Government not only resulted in withholding from the petitioner $119,413.04 which should have been paid the petitioner in 1918, but compelled the petitioner to resist the improper and excessive demand of the Government for taxes. Moreover, the improper withholding by the Government from the petitioner during all of these years of the large sum of money justly due the petitioner, made it impossible for the petitioner to pay, in the first instance, the unjust and excessive demand of the Government for taxes, or any part thereof, or even the part afterwards found to be due, and then seek to recover back the amount that might be held thereafter to have been improperly collected.

The petitioner, therefore, resorted to the only course open to it, namely, its suit in the Court of Claims. In this suit the Government filed as a counterclaim the erroneous and excessive assessment of additional income taxes for the year 1918 in the amount of $191,403.77. The case then proceeded in regular course and the Court of Claims found that there was justly due the petitioner, by the United States, as of the end of the year 1918 $119,413.04, and that as of the same date the petitioner owed the Government, for additional taxes for the year 1918, $82,701.29, a difference in favor of the petitioner of $36,711.75.

As of that date, therefore, namely, 1918, no question of interest was involved, and as the amount found to be due the petitioner by the Government was in excess of the amount found to be due the Government by the petitioner, and as these findings were by the same Court, at one and the same time, in one and the same suit, the petitioner should, in equity, fairness and justice, be entitled to a judgment for the excess, to wit, $36,711.75.

Under the judgment of the Court of Claims complained of, the United States, by improperly withholding from the petitioner, for eighteen years, what was justly due it, and at the same time asserting an unjust and excessive claim for additional taxes, has succeeded not only in liquidating its own debt of $36,711.75 by no payment whatsoever thereon, but has made the petitioner its debtor in the amount of $21,895.89.

Under the authority of the language used by this Court in the *Verdier* case, and above quoted, it would appear to be established that if the Government had brought suit against the American Propeller and Manufacturing Company for $191,403.77, the amount of the additional income tax for 1918 assessed against it, the American Propeller and Manufacturing Company could have availed itself of its claim against the Government as a set-off or counterclaim. Here the situation is merely reversed. In the suit of the American Propeller and Manufacturing Company against the United States, the United States set up its tax claim against the American Propeller and Manufacturing Company as a set-off or counterclaim, so here again the case at bar differs most materially from the *Verdier* case.

We are asking this Court to apply to the present case the principles it applied in the case of *District of Columbia v. Johnson*, 165 U. S. 330. There the District of Columbia, appellant, was endeavoring to off-set against the claim of the claimant, the appellee, interest for a number of years on a counterclaim that had been found by the Referee in favor of the District of Columbia, but which counterclaim was wiped out by the Act of Congress of February 13, 1895 (28 Stat. at L. 664), as found by this Court. The Court of Claims had adopted the contention of the District of Columbia. This Court, in passing upon the matter, said as follows:

> "The claim of the Appellant to off-set against any recovery here the amount of the interest from June

> 1, 1874, on its counterclaim found due in its favor against the claimants, in the report of the referee, we think cannot be admitted. The effect of the passage of the Act of 1895, is in substance, the same as if the counterclaim, which is the principal sum, had been paid, and when that is the case the interest becomes thereby extinguished."

So in the case at bar the Court of Claims found that although as of 1918 the American Propeller and Manufacturing Company owed the United States $82,701.29, the United States, as of the same date, owed the American Propeller and Manufacturing Company more than $82,701,29, to wit, $119,413.04. The effect of these findings of the Court of Claims, to use the language of this Court just quoted, is "in substance the same as if the counterclaim, which is the principal sum, had been paid, and when that is the case the interest becomes thereby extinguished."

The position of the American Propeller and Manufacturing Company is, moreover, much stronger than that of the appellee in the *Johnson* case, because in the *Johnson* case the wiping out of the counterclaim of the District of Columbia, by the Act of 1895, was a *mere gratuity*, as was also true in the *Verdier* case, so far as the allowance of adjusted compensation under the Act of 1883 (22 Stat. at L. 487), is concerned, whereas, here the counterclaim of the United States was wiped out and paid by an actual credit on an actual indebtedness of the United States to the petitioner, and, in addition, the petitioner was never, at any time, actually indebted to the United States upon a proper statement of the account between them, and hence there was never any indebtedness of the petitioner to which interest could properly attach.

The case at bar comes within the principles announced and applied by this Court in the cases of Luckenbach Steamship Company v. Norwegian Barque Thekla, 266 U. S. 328 and Bull v. United States, 295 U. S. 247.

In the *Luckenbach Steamship Company* case the United States filed a claim in admiralty against the Barque Thekla for injury inflicted upon its vessel S. S. F. J. Luckenbach. The owners of the Barque Thekla filed a cross libel. In disposing of the case Mr. Justice Holmes in the course of his opinion said:

> "When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it. * * * The libel in such a case is like a bill for an account, which imports an offer to pay the balance if it should turn out against the party bringing the bill. Colombian Government v. Rothschild, 1 Sim. 94, 103, 57 Eng. Reprint, 514, 5 L. J. Ch. 43, 27 Revised Rep. 171; Goldthwait v. Day, 149 Mass. 185, 187, 21 N. E. 359.
>
> "The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and, on the other hand, the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest. As has been said in other cases, the question of damages to the colliding vessel necessarily arose, and it is reasonable for the court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States. * * * It is said that there is no statute by which the government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

This Court thus held that because the United States had come into court to assert a claim it could be held liable even for a tort and for interest and costs.

In the case at bar, theUnited States came into Court and asserted a counterclaim. By so doing, to use the language of Mr. Justice Holmes above quoted:

> "* * * it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it."

Again quoting the language of Mr. Justice Holmes:

> "It is like a bill for an account which imports an offer to pay the balance if it should turn out against the party bringing the bill."

In the case at bar, as in the *Luckenbach Steamship Company* case:

> "* * * the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest."

In the *Bull* case also, as in the case at bar, there were present features of unusual hardship and injustice. That case also came before this Court on a writ of certiorari to the United States Court of Claims. There the Estate of Archibald H. Bull had paid an estate tax of $41,517.45 based upon a sum of $212,718.79 as constituting part of the corpus of the estate, as insisted upon by the Commissioner of Internal Revenue. Four years afterwards the Commissioner determined that $200,117.09 of the above sum of $212,718.79 should have been returned by the Executor also as income, and made a deficiency income tax assessment, based upon such finding. The Executor appealed from said deficiency assessment to the Board of Tax Appeals but the Board sustained the Commissioner's action and determined a deficiency of $55,166.49 which, with interest added of $7,510.95, was paid by the Executor on April 14, 1928.

On July 11, 1928, the Executor filed a claim for refund of this amount. The claim was rejected May 8, 1929, and on September 16, 1930, the Executor brought suit in the Court of Claims and in his petition, after setting forth the facts as he alleged them to be, prayed judgment in the alternative "(1) for the principal sum of $62,677.44, the amount paid April 14, 1928, as a deficiency of income tax unlawfully assessed and collected, or (2) for the sum of $47,643.44 on the theory that if the sum of $200,117.99 was income for the year 1920, and taxable as such, the United States should have credited against the income tax attributable to the receipt of this sum the overpayment of estate tax resulting from including the amount in the taxable estate,—$34,035, with interest thereon."

The Court of Claims held that the item was income and properly so taxed and denied the alternative relief sought because the claim was barred by limitations.

This Court held that the decision of the Court of Claims as to what constituted income was correct. It was also evident that the application for a refund of the overpayment of the estate tax was not filed within the time prescribed by statute. It was clearly evident, however, that the estate had paid both an estate tax and an income tax on the same sum of money, and that the United States had been improperly enriched and had money belonging to the Bull Estate which it had no moral right to retain. Under these circumstances this Court was astute to find a reason why the United States had no legal right to hold on to this unjust enrichment. The Court after stating that

> "The fact that the petitioner relied on the Commissioner's assessment for estate tax, and believed the inconsistent claim of deficiency of income tax was of no force, cannot avail to toll the statute of limitations, which forbade the bringing of any action in 1930 for refund of the estate tax payments made in 1921."

asked:

> "Upon what theory, then, may the petitioner obtain redress in the present action for the unlawful retention of the money of the estate?"

In answering this question the Court reviewed the nature of a tax and the means of enforcing its collection. In the course of this explanation the Court said:

> "The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer."

A little later on in the opinion the Court quotes, with approval, the following from United States v. Ringgold, 8 Pet. 150, 163, 164:

> "No direct suit can be maintained against the United States. But when an action is brought by the United States, to recover money in the hands of a party who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such a claim in a court of justice, and turn him round to an application to Congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defense, to a suit by the United States."

This Court finally held that notwithstanding the fact that the suit in the Court of Claims had been brought by the Executor of the Bull Estate against the United States, and that the United States had filed no counter-

claim, nevertheless the bar of the statute of limitations was not effective because the claim of the Executor was, in effect, in the nature of a recoupment against a summary demand for income tax, asserted in 1925 and paid April 14, 1928. This Court accordingly held that the Executor of the Bull Estate was entitled to have credited against the deficiency of income tax that had been *correctly* assessed, the amount of his overpayment of estate tax, with interest, notwithstanding the fact that his suit for the recovery of this overpayment was barred by the applicable statute of limitations, and that he should have been given judgment accordingly.

While it is true that in the case at bar the United States had actually received no money of the petitioner, it had been actually indebted to the petitioner for propellers which it had received from the petitioner but had not paid for and for money which the petitioner had expended on behalf of the United States, at its request, and the United States had had those propellers since 1918 and had enjoyed the benefit of the petitioner's money since 1918.

The United States, therefore, ever since 1918 had wrongfully withheld from the taxpayer, the petitioner, $119,413.04 which the petitioner, certainly, in justice and equity, should be permitted to set-off against the claim of the United States for a deficiency tax for 1918 asserted by the United States by a counterclaim filed against the petitioner in a proceeding in the Court of Claims, and as both claims matured the same year, to wit, 1918, and as the actual indebtedness of the United States to the petitioner exceeded the actual indebtedness of the petitioner to the United States by $36,711.75, a judgment for at least that amount should, in equity and justice, be entered for the petitioner.

The counterclaim of the United States, as found by the Court of Claims in the amount of $82,701.29, is a

deficiency income and excess profit tax due by the petitioner for the year 1918. Under the Act of 1918, it is clear that interest could not be awarded on a deficiency income and excess profit tax for that year from the time the tax was really due until a deficiency tax was assessed (Ford Motor Co. v. United States, 9 F. Supp. 590, 602 (C. Cls.), certiorari denied, 296 U. S. 636, and Standard Oil Co. v. United States, 10 F. Supp. 550, 562 (C. Cls.). However, there are other provisions in the Revenue Act of 1918 which would seem to authorize the allowance of interest on a deficiency assessment accounting from the date of the deficiency assessment, *upon notice and demand for payment by the Collector.*

In the case at bar, the excessive and erroneous deficiency assessment of $191,403.77 was made by the Commissioner of Internal Revenue on June 14, 1924. This erroneous and excessive assessment was set aside by the Court of Claims on April 6, 1936, and the Court of Claims has allowed interest on the correct amount, as found by it, to wit, $82,701.29 from June 14, 1924, to said April 6, 1936.

We respectfully submit that it is within the spirit of the Revenue Law of 1918, if not within the very letter of that Act, that interest is not properly chargeable from the date of a deficiency assessment unless the deficiency assessment is a *proper one*. Certainly in the case at bar the assessment of the Commissioner of June 14, 1924, was so excessive and erroneous that it should be ignored as furnishing the date from which interest should be charged upon a correct assessment not made until twelve years thereafter, when the Court of Claims corrected the Commissioner's erroneous assessment, the United States during all that period being indebted to the taxpayer in an amount much greater than the amount of the correct assessment.

FINALLY.

Sub-sections (b) (2), (c), and (e), of Section 250, of the Revenue Act of 1918, *require* a notice from and demand for payment by the *Collector*, as distinguished from the *Commissioner* of Internal Revenue, as a condition precedent to the right of the Government to collect interest upon a deficiency assessment for the year 1918. The burden of proving such notice and demand manifestly rests upon the United States.

See Selma, Rome and Dalton R. R. Company v. United States, 139 U. S. 560, at 568, where this Court quoted with approval from 1 Greenleaf on Evidence, and also from Starkie on Evidence, as follows:

> "It has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact, which lies more particularly within his knowledge, or of which he is supposed to be cognizant."

In Omaha Hotel Company v. Wade, 97 U. S. 13, this Court held that:

> "The burden of proof is upon the party making an affirmative allegation."

and in United States v. Linn, 1 Howard 104, it is said:

> "He who holds the affirmative must prove it."

The Respondent holds the affirmative so far as its counterclaim is concerned.

No allegation or proof of such notice from and demand for payment by the *Collector*, as required by said sub-sections of the Act of 1918, is contained in the Findings of Fact of the Court of Claims or in the record in the case. The only *proof* bearing in any way upon this point will

be found in the Court of Claims' Findings of Fact on page 66 of the record and is as follows:

> "June 14, 1924, the *Commissioner* assessed against Plaintiff a tax for 1918 of $191,403.77, in addition to that already assessed and paid, and duly notified the Plaintiff with regard thereto. No part thereof has been paid by the Plaintiff." (Finding No. 40, R. 66.)

The only *allegation* bearing upon this point in any way will be found in the amended counterclaim of the United States filed November 12, 1927, reading as follows:

> "In the year 1924 the *Commissioner* of Internal Revenue made an additional assessment of income taxes against the Plaintiff for the year 1918 in the amount of $191,403.77. This assessment appears on the 1924 list No. June 0080 L. No. 6. The Plaintiff was duly *notified of such assessment* and said taxes have not been paid." (R. 44).

Neither the above Finding of Fact nor the above Allegation proves either notice from or demand by the *Collector*. At the most they merely show notice of the assessment from the *Commissioner*—but no demand for payment whatsoever from any one.

The Revenue Act of 1918 defines the term "*Commissioner*" as follows:

> "The term '*Commissioner*' means the Commissioner of Internal Revenue."

and the term "*Collector*" as follows:

> "The term '*Collector*' means Collector of Internal Revenue."

Hence, the Statute not having been complied with, interest cannot be added *thereunder*.

For the above reasons it is respectfully submitted that the Court of Claims erred in not entering a judgment in

favor of the petitioner, American Propeller and Manufacturing Company in the amount of $36,711.75, instead of a judgment against the American Propeller and Manufacturing Company in the amount of $21,895.89.

Respectfully submitted,

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APPENDIX.

Act of Congress of February 24, 1919, c. 18, 40 Stat. L. 1057, 1083 (cited as Revenue Act of 1918):

"Sec. 250. (b) [2] If the amount already paid is less than that which should have been paid, the difference shall, to the extent not covered by any credits then due to the taxpayer under Section 252, be paid upon notice and demand by the collector. In such case if the return is made in good faith and the understatement of the amount in the return is not due to any fault of the taxpayer, there shall be no penalty because of such understatement. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency plus interest at the rate of 1 per centum per month on the amount of the deficiency of each installment from the time the installment was due.

If the understatement is false or fraudulent with intent to evade the tax, then, in lieu of the penalty provided by Section 3176 of the Revised Statutes, as amended, for false or fraudulent returns willfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the amount of the deficiency.

Sec. 250. (c) If the return is made pursuant to Section 3176 of the Revised Statutes as amended, the amount of tax determined to be due under such return shall be paid upon notice and demand by the collector.

Sec. 250. (e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of

5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: PROVIDED, That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month.

In the case of the first installment provided for in subdivision (a) the instructions printed on the return shall be deemed sufficient notice of the date when the tax is due and sufficient demand, and the taxpayer's computation of the tax on the return shall be deemed sufficient notice of the amount due."

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 605

AMERICAN PROPELLER AND MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 46–83) is reported in 14 F. Supp. 168, and is supplemented by a memorandum filed October 5, 1936 (R. 45).

JURISDICTION

The original judgment of the court below in favor of petitioner was entered April 6, 1936. Both petitioner and respondent moved for a new trial (R. 43). Memorandum and order overruling petitioner's motion for a new trial and allowing in part respondent's motion for a new trial was en-

tered on October 5, 1936 (R. 44-46). The petition for a writ of certiorari was filed December 29, 1936 (R. 84). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner filed suit on a contract breached in 1918 and the United States counterclaimed for delinquent income and excess profits taxes for 1918; the Court of Claims decided favorably on the claims of each party. The question is whether, since the petitioner is not entitled to interest on its claim, the claims should be merged as of 1918, so as to prevent recovery of interest by the United States.

STATUTES INVOLVED

The pertinent portions of the applicable statutes are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

The special findings of fact of the Court of Claims are found at pages 46–70 of the Record, and are supplemented by the memorandum filed and the order entered October 5, 1936 (R. 44–46).

The suit in the Court of Claims was based solely on a breach by the United States of certain contracts. Counterclaim for delinquent income and excess-profits taxes for the year 1918 was duly filed by the United States. This counterclaim is based on a deficiency assessment made on June 14, 1924 (R. 66). The findings of fact and the conclusions

of law as to the amounts due the petitioner and the respondent are not disputed. The petition for a writ of certiorari asserts error only in respect of the refusal of the Court of Claims to merge the claims as of 1918, with the result that the United States recovered interest on the delinquent taxes.

The Court of Claims found that petitioner is entitled to recover $119,413.04 on the various claims set out in its petition. It refused to allow interest thereon (R. 77). The court also found that respondent is entitled to recover as an underpayment of taxes for 1918 the amount of $82,701.29 (R. 45). It allowed interest thereon at 6% from June 14, 1924, the date of the additional assessment (R. 66), to April 6, 1936, the date of the establishment of petitioner's claim and entry of judgment under the original opinion, in the amount of $58,607.64 (R. 45, 82). Thus the total allowance upon the counterclaim was $141,308.93 (R. 45). The Court of Claims therefore entered judgment in favor of the respondent in the amount of $21,895.89, with interest from April 6, 1936, the date of entry of the original judgment (R. 84).

ARGUMENT

Petitioner does not challenge the decision below insofar as it determined respondent's liability for breach of contract, petitioner's liability for unpaid taxes, or petitioner's inability to recover interest on its claim for breach of contract. It does not dispute the Government's right to recover interest

on the unpaid taxes apart from the effect of petitioner's claim for breach of contract. It seeks review of the decision below only insofar as it refuses to merge the tax claim into the contract claim as of the end of 1918 (Pet. 9–10).

Petitioner's argument that the claim for delinquent taxes should be merged into its claim for breach of contract would have the effect of allowing interest against the United States on the claim for breach of contract. It is settled that no such allowance can be made. Judicial Code, Section 177, U. S. C., Title 28, Sec. 284; *Tillson* v. *United States,* 100 U. S 43, 46; *Cherokee Nation* v. *United States,* 270 U. S. 476, 487. The rule is so well established that even in cross-libels arising out of a mutually negligent collision, where interest is ordinarily awarded, the United States can recover interest but the private owner cannot. *Boston Sand Co.* v. *United States,* 278 U. S. 41, 49; *United States* v. *Commonwealth Line,* 278 U. S. 427.

Even apart from the inability to award interest against the United States on such a claim, the damages for the breach of contract were unliquidated. The general rule is that no interest can be awarded on such claims prior to judgment. *Williston* on Contracts, Vol. 3, Sec. 1413 (1st Ed.); *Sedgwick* on Damages, Vol. 1, Sec. 312 (9th Ed.); see *Barrow* v. *Reab,* 9 How. 366, 370–371; *Funkhouser* v. *J. B. Preston Co.,* 290 U. S. 163, 168. It seems to follow that there can be no merger of such a claim with a claim which is entitled to bear interest.

The petitioner urges only that the Court of Claims misconstrued *United States* v. *Verdier*, 164 U. S. 213, and entered a decision which conflicts in principle with *District of Columbia* v. *Johnson*, 165 U. S. 330. In the *Verdier* case the United States was held entitled to recover interest on the shortage of a postmaster's accounts even though the postmaster's claim for an increased salary was not allowed to bear interest. The Court based its decision in part on the statutory requirement that interest be paid on delinquent accounts of public officers and in part on the consideration that (pp. 218–219):

> An inherent vice of petitioner's argument is in the assumption that he and the government stand upon an equality with respect to interest. The truth is that in its dealings with individuals public policy demands that the government should occupy an apparently favored position.

See *United States* v. *North American Co.*, 253 U. S. 330, 336, explaining the *Verdier* case as resting upon this latter ground. We see nothing in the decision below which misconstrues the *Verdier* case. *District of Columbia* v. *Johnson, supra,* has no application to this case. There an Act of 1895 allowed suit on claims against the District which had been illegal when they arose 20 years before. The court denied interest on these claims and also denied the District's counterclaim for interest on a related obligation which was extinguished by the

Act of 1895, as a result of which "the interest becomes thereby extinguished" (p. 339).

It was assumed by the court and the parties below that interest could be awarded on deficiencies arising under the 1918 Act. Petitioner did not object to this assumption in the court below and makes no objection here. *Ford Motor Co.* v. *United States,* 9 F. Supp. 590, 602 (C. Cls.), certiorari denied, 296 U. S. 636, and *Standard Oil Co.* v. *United States,* 10 F. Supp. 550, 562 (C. Cls.), certiorari on other grounds denied, 296 U. S. 597, which held that no interest could be collected on deficiencies under the 1917 and 1918 Acts assessed before February 26, 1926, are thus inapplicable.

CONCLUSION

It is settled that the plaintiff's inability to recover interest does not prevent the award of interest on the Government's counterclaim or permit merger of the claims. Wherefore, it is respectfully submitted that the petition, presenting this question alone, should be denied.

STANLEY REED,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
G. W. BILLINGS,
Special Assistants to the Attorney General.
WARNER W. GARDNER,
Attorney.

FEBRUARY 1937.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

SEC. 250. * * *

(b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should have been paid, the difference shall, to the extent not covered by any credits then due to the taxpayer under section 252, be paid upon notice and demand by the collector. In such case if the return is made in good faith and the understatement of the amount in the return is not due to any fault of the taxpayer, there shall be no penalty because of such understatement. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency, plus interest at the rate of 1 per centum per month on the amount of the deficiency of each installment from the time the installment was due.

* * * * *

(e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided,* That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month.

* * * * *

Revenue Act of 1926, c. 27, 44 Stat. 9, 64:

SEC. 283. * * *

(d) In the case of any assessment made after the enactment of this Act in respect of a tax imposed by any Act of Congress prior to November 23, 1921, interest upon the tax proposed to be assessed shall be assessed at the same time as such tax, shall be paid upon notice and demand from the collector, and shall be collected as part of such tax, at the rate of 6 per centum per annum, from the date of the enactment of this Act to the date such tax is assessed, or, in the case of a waiver under subdivision (d) of section 274, to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed, whichever is the earlier.

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 46–83) is reported in 14 F. Supp. 168, and is supplemented by a memorandum filed October 5, 1936 (R. 45).

JURISDICTION

The original judgment of the Court of Claims in favor of petitioner was entered April 6, 1936. Both parties moved for a new trial. (R. 43.) Memorandum and order overruling petitioner's motion and allowing respondent's motion in part was entered on October 5, 1936 (R. 44–46).

The petition for a writ of certiorari was filed December 29, 1936, and was granted, limited to the question of the allowance of interest to the Government upon its claim, on February 15, 1936 (R. 84). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner brought suit on a contract breached in 1918, and the United States counterclaimed for delinquent income and excess profits taxes for 1918 which were assessed in 1924. The Court of Claims decided favorably on the claims of both parties. The sole question, under the order granting the petition for a writ of certiorari, is whether the Government is entitled to interest.

STATUTES INVOLVED

The pertinent portions of the applicable statutes are set forth in Appendix A (*infra*, pp. 13–15).

STATEMENT

The special findings of fact of the Court of Claims are found at pages 46–70 of the record, and are supplemented by the memorandum filed and the order entered October 5, 1936 (R. 44–46). Those which are relevant to the question under consideration may be summarized as follows:

The suit in the Court of Claims was based solely on a breach by the United States of certain con-

tracts in 1918. Counterclaim for delinquent income and excess profits taxes for the year 1918 was duly filed by the United States. The counterclaim, as amended, set forth that the petitioner was indebted to the respondent by reason of income taxes duly assessed and unpaid. These unpaid taxes included, among those for other years, the amount of $191,403.77 for the year 1918, representing an additional assessment made against petitioner in 1924. The counterclaim further alleged that petitioner was duly notified of the assessment and that it had not been paid (R. 42).

The additional assessment of $191,403.77 for 1918 was the only additional assessment considered by the court below. The Court of Claims found that this amount was assessed by the Commissioner of Internal Revenue against petitioner on June 14, 1924, and that petitioner was duly notified, and that no part of it has been paid by the petitioner (R. 66).

The Court of Claims found that petitioner was entitled to recover $119,413.04 on the various claims set out in its petition but refused to allow interest (R. 77). The court also found that respondent was entitled to recover for an underpayment of taxes for 1918; its memorandum on rehearing fixed the amount at $82,701.29 (R. 45). It allowed interest thereon at 6% from June 14, 1924, the date of the additional assessment (R. 66), to April 6, 1936, the date of the establishment of petitioner's claim

and entry of judgment under the original opinion, in the amount of $58,607.64 (R. 45, 82). Thus the total allowance upon the counterclaim was $141,308.93 (R. 45), and the Court of Claims, therefore, entered judgment in favor of the respondent in the amount of $21,895.89, with interest from April 6, 1936, the date of entry of the original judgment (R. 84).

SUMMARY OF ARGUMENT

The only question presented is whether or not the United States is entitled to recover interest on the unpaid taxes because of the unpaid deficiency assessment; no interest was claimed or awarded for the period prior to notice of the additional assessment. Section 250 (e) of the Revenue Act of 1918 expressly provides that the United States shall be entitled to interest at the rate of 1% per month after notice of the assessment and demand for payment by the Collector. Thus the question reduces itself to whether or not such notice and demand were made.

The Court of Claims found that "the Commissioner * * * duly notified plaintiff" of the assessment. Since the question of notice and demand was not contested in the Court of Claims, this general language is sufficient to indicate that the normal machinery was set in motion, resulting in notice of assessment and demand for its payment by the Collector. Under Section 3184 of the Revised Statutes, and under the established administrative practice, the Commissioner directs the Collector to

give notice and to make demand for the payment of additional taxes; both notice and demand are included in the same form. The presumption of official regularity is sufficient for a conclusion that both notice and demand were given.

The statement of the Court of Claims that no demand was made is found in its opinion, and may not be used to supplement the findings of fact. *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 206.

The only error of the Court of Claims was its failure to award interest at the statutory rate of 12% per year, and respondent does not complain of this error. In the event that there should be doubt as to the meaning of the finding of the Court of Claims, the case should be remanded in order that new findings may be made.

ARGUMENT

The petition for a writ of certiorari was granted "limited to the question of the allowance of interest to the Government upon its claim." It is desirable at the outset to clarify the issues which exist between petitioner and the Government with the case thus limited.

1. Petitioner strenuously urges that it is inequitable to allow the Government interest on its claim when petitioner can receive none on its claim (Br. 12–18). This question, at least when phrased as the necessity of merging the cross-claims as of 1918, was the only question presented by the petition (Pet. 6, 9–10). It follows that the limitation

imposed by this Court requires that the Government's claim for interest must be considered independently of petitioner's inability to recover interest.[1]

2. Petitioner also argues that unpaid taxes for the year 1918 did not bear interest until a deficiency was assessed (Br. 18–19). So far as this case is concerned, we do not contest this proposition. See *Ford Motor Co.* v. *United States,* 9 F. Supp. 590 (C. Cls.), certiorari denied, 296 U. S. 636; *Standard Oil Co.* v. *United States,* 10 F. Supp. 550 (C. Cls.), certiorari denied, 296 U. S. 597; compare *Billings* v. *United States,* 232 U. S. 261, 284–288. The Commissioner did not assess any interest on the unpaid taxes when the assessment was made on June 14, 1924 (R. 66–69). The Court of Claims did not include any interest for the period prior to the deficiency assessment in its judgment (R. 81–82, 45).

It thus results that the only question presented for the decision of this Court is whether the Government is entitled to recover interest from the date of notice of the deficiency.

Section 250 (e) of the Revenue Act of 1918 (*infra,* p. 13) provides that if any tax remains unpaid

[1] The contention is, in any event, precluded by decisions of this Court. See *United States* v. *Verdier,* 164 U. S. 213, 218–219; *United States* v. *North American Co.,* 253 U. S. 330, 336; *Boston Sand Co.* v. *United States,* 278 U. S. 41, 49; *United States* v. *Commonwealth Line,* 278 U. S. 427.

after the date when it is due, and for ten days after notice and demand by the collector, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, *plus interest at the rate of 1 per centum per month* upon such amount from the time it became due. Substantially the same provision was continued in the later Acts until the enactment on August 30, 1935, of the Revenue Act of 1935; Section 404 of this Act (*infra*, p. 14) provided that interest thereafter accruing upon any internal-revenue tax not paid when due should be at the rate of 6 per centum per annum. It follows that, if notice and demand were made on petitioner, the United States is entitled to interest at 12 per cent per annum to August 30, 1935, and 6 per cent thereafter.

The amended counterclaim filed for the Government sets forth that petitioner was indebted to the respondent for income taxes duly assessed against the petitioner for the year 1918 in the amount of $191,403.77, and that petitioner "was duly notified of such assessment" (R. 42). The Court of Claims found that on June 14, 1924, the Commissioner of Internal Revenue assessed against the petitioner a tax for 1918 of $191,403.77, in addition to that already assessed and paid, "and duly notified plaintiff with regard thereto", but that no part thereof had been paid (R. 66).

On the pleadings and this finding of fact, the Court of Claims held in its original opinion that interest should be allowed the Government computed on the amount of the additional assessment at the rate of 6% from June 14, 1924, the date of the assessment, to April 6, 1936, the date of the original judgment (R. 83). Thereupon respondent filed a motion for a new trial in which it was contended that interest should have been computed at 12% per year to August 30, 1935, and at 6% per year thereafter (R. 43, 45–46). The Court of Claims in its memorandum opinion of October 5, 1936, said that the record failed to show that any demand was made for the payment of the additional tax when the assessment was made and notice given in June, 1924 (R. 4–6). The special findings of fact were not amended to find an absence of demand. The court therefore denied the claim for interest of 12 per cent but nevertheless continued its allowance of interest of 6 per cent (R. 45–46).

No question was raised in the court below as to the lack of notice of assessment and demand for payment of the additional tax assessed in June, 1924. (See R. 43.) Respondent's counterclaim alleged petitioner was duly notified of such assessment, and in its special findings of fact the Court of Claims in like language found that "the Commissioner * * * duly notified plaintiff with regard thereto." (R. 66.) This language is in gen-

eral terms, but was sufficient for the issues presented to the Court of Claims for decision. We submit that it is necessarily the equivalent of a finding that notice of assessment and demand for payment were given and made.

By Section 3184 of the Revised Statutes (*infra*, p. 15) it is made the duty of Collectors of Internal Revenue, within ten days after receiving any list of taxes from the Commissioner of Internal Revenue to "give notice to each person liable to pay any taxes stated therein * * * stating the amount of such taxes and demanding payment thereof." Under the terms of this statute no provision is made for the Collector to give notice of the deficiency without at the same time demanding payment.

Under the established practice in the Bureau of Internal Revenue in respect of assessments of additional taxes, the forms for the notice and demand are prepared in the office of the Commissioner and accompany the assessment list when it is forwarded to the Collector for his use in complying with the statutory requirement. (See SOC–Mim. 2550, issued by the Commissioner of Internal Revenue to all Collectors on July 23, 1920, Appendix B, *infra*, p. 16). Moreover, equally well established practice demonstrates that the form for notice of the deficiency assessment includes also a demand for its payment. (See Appendix B, *infra*, p. 18.)'

There is, then, both a statutory requirement and established administrative practice that the Collector give notice and make demand for payment within ten days after receipt of the assessment list from the Commissioner. The finding of the Court of Claims that "the Commissioner * * * duly notified" petitioner could have meant nothing but that the Commissioner set in motion the normal administrative machinery which resulted in a notice demanding payment. While it is a rather summary method of stating the actual facts, the issues which the parties, and the Court of Claims in its original opinion, considered to be before the court did not require any greater particularity. Since there was no evidence to indicate a departure from the statutory and administrative procedure, the presumption of official regularity is sufficient to make this finding the equivalent of a finding of notice and demand by the Collector. See *Pacific States Co.* v. *White*, 296 U. S. 176, 186; *Thompson* v. *Consolidated Gas Utilities Corp.*, No. 89, October Term, 1936. We submit that this is more than sufficient to overcome the burden of proof upon which petitioner places its chief reliance (Br. 20–21).

The only consideration which would indicate that the Collector did not give notice and make demand is the statement in the memorandum opinion of the Court of Claims. (R. 46.) But the opinion may not be examined to supplement the findings of fact. *United States* v. *Esnault-Pelterie*, 299 U. S.

201, 206; *United States* v. *Wells*, 283 U. S. 102, 120; *Brothers* v. *United States*, 250 U. S. 88, 93; *Crocker* v. *United States*, 240 U. S. 74, 78.

It results that the findings of the Court of Claims must be taken to mean that there was notice and demand by the Collector. It is true that there was no express finding to this effect. But, as this Court said in *United States* v. *Wells, supra*, 120, the facts which are a "necessary inference" from those found may be accepted by this Court. In other words, the facts found by the Court of Claims "are sufficient to compel decision" (*United States* v. *Esnault-Pelterie, supra*, 206) as to the issue of notice and demand by the Collector when considered in the light of his statutory and regular administrative duties. See also *Stone* v. *United States*, 164 U. S. 380; *Crocker* v. *United States*, 240 U. S. 74; *Brothers* v. *United States*, 250 U. S. 88; *United States* v. *Pugh*, 99 U. S. 265; *Botany Mills* v. *United States*, 278 U. S. 282.

We recognize that this interpretation is contrary to that of the Court of Claims as expressed in its memorandum opinion. If this circumstance should be considered sufficient to raise a doubt that demand for payment was, in fact, made as provided for in the statute and by the established practice, we submit that the case should be remanded to the Court of Claims in order that its findings may be supplemented and clarified, with authority to take additional evidence if necessary to permit a finding disclosing the actual situation.

See *United States* v. *Jefferson Electric Co.*, 291 U. S. 286, 406; *Luckenbach S. S. Co.* v. *United States*, 533, 539.

We therefore submit that the Government is entiled to interest on the additional tax assessed against the petitioner on June 14, 1924, under the applicable statutory provisions awarding interest on a tax which became delinquent and remained unpaid. The only error of the Court of Claims was its failure to compute interest at the statutory rate of 12% per year from June 14, 1924, to August 30, 1935, but of this error the respondent has not complained.

CONCLUSION

Wherefore, it is respectfully submitted that the decision of the Court of Claims should be affirmed, or, if deemed necessary, the case should be remanded to the Court of Claims in order that its findings may be supplemented and clarified, with authority to take additional evidence if necessary to permit a finding disclosing the actual situation.

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JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
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G. W. BILLINGS,
Special Assistants to the Attorney General.
WARNER W. GARDNER,
Attorney.

MARCH, 1937.

APPENDIX A

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

SEC. 250. * * *

(b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should have been paid, the difference shall, to the extent not covered by any credits then due to the taxpayer under section 252, be paid upon notice and demand by the collector. In such case if the return is made in good faith and the understatement of the amount in the return is not due to any fault of the taxpayer, there shall be no penalty because of such understatement. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency, plus interest at the rate of 1 per centum per month on the amount of the deficiency of each installment from the time the installment was due.

* * * * *

(e) If any tax remains unpaid after the date when it is due, and for ten days after

notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided*, That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month.

* * * * *

Revenue Act of 1926, c. 27, 44 Stat. 9, 64:

SEC. 283. * * *

(d) In the case of any assessment made after the enactment of this Act in respect of a tax imposed by any Act of Congress prior to November 23, 1921, interest upon the tax proposed to be assessed shall be assessed at the same time as such tax, shall be paid upon notice and demand from the collector, and shall be collected as part of such tax, at the rate of 6 per centum per annum, from the date of the enactment of this Act to the date such tax is assessed, or, in the case of a waiver under subdivision (d) of section 274, to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 404. INTEREST ON DELINQUENT TAXES. Notwithstanding any provision of law to the contrary, interest accruing during any period of time after the date of the enactment of this Act upon any internal-revenue

tax (including amounts assessed or collected as a part thereof) or customs duty, not paid when due, shall be at the rate of 6 per centum per annum.

(U. S. C., Sup. II, Title 26, Sec. 1693 (a).)

Revised Statutes, Sec. 3184:

Where it is not otherwise provided, the collector shall in person or by deputy, within ten days after receiving any list of taxes from the Commissioner of Internal Revenue, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes and demanding payment thereof. * * *

(U. S. C., Title 26, Sec. 1545.)

APPENDIX B

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C., July 23, 1920.

SOC–Mim. 2550.

INCOME TAX ASSESSMENT LISTS AND DEMAND NOTICES FORMS 7658 AND 7659

Collectors of Internal Revenue:

Beginning with the July list the Income Tax Unit will prepare the Bureau Assessment List for assessments made by the Bureau on Form 23–A. At the same time, first and second demand notices, Forms 7658 and 7659, are prepared and are ready to mail to the taxpayer. Upon receipt of the lists from the Bureau, Collectors are requested to immediately mail Form 7658 which is the first demand notice. A suspense file should be kept of Form 7659 and as the Forms 7658 are returned by the taxpayers, the corresponding second demand notice should be withdrawn. If the first notice is not returned at the expiration of the ten-day period, the second notice should be mailed immediately.

The demand notices will be numbered to correspond with the taxpayer's page and line number on the list. They will begin with 0 each month and be prefixed by the abbreviation for the month, i. e., the July list and demand notices will be designated as J1. 00, August, Ag. 00, etc., as outlined in Office Procedure XVIII.

For follow-up purposes, it is deemed advisable to make notation on the list opposite the taxpayer's

name in the "Remarks" column of the date on which the first notice was mailed and, if a second notice is necessary, the date on which it was mailed. If the taxpayer neither returns nor replies to either of the demand notices within the time provided by law, a warrant of distraint should be issued.

The suspense file of Forms 7659 should be arranged by due dates. This facilitates prompt mailing and will aid in matching the first notices as they are returned.

WM. M. WILLIAMS,
Commissioner.

TREASURY DEPARTMENT,
Washington, March 3, 1937.

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of original SOC Mimeograph 2550 dated July 23, 1920, signed by Wm. M. Williams, Commissioner, on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFELD,
Chief Clerk, Treasury Department.

EXTRACTS FROM FORMS 7658 AND 7659 FOR NOTICE AND DEMAND, IN USE FROM 1920 TO JULY 1924

INCOME, WAR-PROFITS, AND EXCESS-PROFITS TAX

NOTICE AND DEMAND FOR TAX

Form 7658

UNITED STATES INTERNAL REVENUE SERVICE

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of 5 per cent of the amount of tax due will be added, plus interest at the rate of 1 per cent per month, from _____ until paid.

Date _____

INCOME, WAR-PROFITS, AND EXCESS-PROFITS TAX

SECOND NOTICE AND DEMAND FOR TAX

Form 7659

UNITED STATES INTERNAL REVENUE SERVICE

Demand is hereby made for the payment of the taxes stated on this notice with a penalty of 5 per

cent which has been incurred by failure to pay such taxes within the prescribed time. Beginning on the due date stated below, interest will also accrue at the rate of 1 per cent per month until paid. If payment of tax, penalty, and interest is not received within ten days, the Act provides that collection with costs shall be made by seizure and sale of property.

Due date _____.

TREASURY DEPARTMENT,
Washington, March 6, 1937.

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed are true copies of Notice and Demand Forms 7658 and 7659 as originally issued in 1920, and in use until July 1924, as shown by the records of the Bureau of Internal Revenue on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[SEAL] F. A. BIRGFELD,
Chief Clerk, Treasury Department.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 605.—October Term, 1936.

American Propeller and Manufacturing Company, Petitioner, *vs.* The United States. } On Writ of Certiorari to the Court of Claims.

[March 29, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a proceeding brought in the Court of Claims by petitioner to recover a balance of $144,238.03 alleged to be due from the government under certain designated contracts. The government filed a general traverse, and a counterclaim for a deficiency income and excess-profits tax assessment in the sum of $191,403.77. The taxes were for the year 1918, and were assessed on the 14th day of June, 1924. The court below found that the government was indebted to petitioner upon the contracts in the sum of $119,413.04. Upon the counterclaim the court found that the tax liability of petitioner was $82,701.29. Upon this latter sum, it allowed interest, at the rate of 6% per annum from the date of assessment, in the sum of $58,607.64, bringing the total allowance upon the counterclaim to the sum of $141,308.93. Judgment was given against petitioner for the difference between that sum and the sum due under the contracts, namely $21,895.89. The opinion of the court will be found in 14 F. Supp. 168; and a supplemental opinion in the form of a memorandum was filed on October 5, 1936. We granted certiorari, limited to the question of the allowance of interest to the government upon its counterclaim.

In the argument here, both parties proceed upon the theory that interest was allowed under the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, § 250 (e).[1] The government contended below that

[1] Sec. 250. (e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided*, That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month. . . .

under that section it was entitled to interest at the rate of 1 per centum per month instead of 6 per centum per annum. It abandons that contention here, but insists that it is entitled to at least the interest allowed by the court below.

It will be seen that under the findings, the government was indebted in 1924 to petitioner in the sum of $119,413.04, against which there was at the same time a just counterclaim of $82,701.29; so that if the account had been adjusted at that time instead of 12 years later, the government would have been obliged to pay petitioner the difference between these two sums, or $36,711.75. The inequity of allowing the government interest for 12 years under these circumstances, so as to bring the petitioner in debt to the government in the sum of over $21,000, is so gross as to be shocking.

We have said (*United States* v. *The Thekla*, 266 U. S. 328, 339-340, 341)—"When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it . . . the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest." If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law.

Section 250 (e), *supra*, provides for the allowance of interest where the tax remains unpaid after the date when it is due and "for ten days after notice and demand by the collector." The court below found that on June 14, 1924, the commissioner made the assessment "and duly notified plaintiff with regard thereto." It made no other finding in respect of that matter. The government contends that the finding which was made means that the commissioner set in motion the normal administrative machinery which resulted in a notice demanding payment, and relies upon the presumption of official regularity as being sufficient to make this finding the equivalent of a finding of notice and demand by the collector. *Pacific States Co.* v. *White*, 296 U. S. 176, 186.

But we are dealing here not with a presumption, but with a specific finding; and that finding should be examined in the light of

the pleadings. *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 539. The amended counterclaim of the government, filed in 1927, among other things, alleges that "the Commissioner of Internal Revenue made an additional assessment" of which the plaintiff [petitioner] was duly notified. The collector is not mentioned and no demand is alleged. Considering the finding in connection with the allegation, the former fairly may be construed as comprehending all that was done in attempted compliance with the condition imposed by § 250 (e) as a prerequisite to the allowance of interest. But this is not all that appears.

In the memorandum supplementing the original opinion, the court below said: "The record fails to show that any demand was made and we can not presume that it was. On the contrary, in view of the fact that plaintiff at the time was claiming that the defendant was indebted to it in a sum larger than the amount of the tax, it is more probable that no such demand was made." While it is true that this court is not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings,[2] the rule is not absolute and does not preclude reference to the opinion for all purposes whatsoever. It is well established that in case of ambiguity, extrinsic aid may be sought in order to settle the meaning of a statute or a contract. We see no reason why the principle of that rule does not permit reference to the opinion of the court in order to clarify the meaning of a finding otherwise in doubt. The government suggests that in such case the proper course is to remand the case to the Court of Claims in order that that court may supplement and clarify the finding and, if necessary, take additional evidence to that end. Of course, that sometimes has been done; but where, as here, the finding, the pleadings and the opinion of the court, taken together, clearly show that § 250 (e) in the particular under consideration was not complied with, it is unnecessary to follow that procedure.

This proceeding was originally brought in 1922. The deficiency assessment was made while the case was pending. The counterclaim of the government was first filed in 1926, and an amended counterclaim in 1927. Under these circumstances we see no reason for remanding the case upon the mere chance that the govern-

[2] Stone *v.* United States, 164 U. S. 380, 383; United States *v.* Wells, 283 U. S. 102, 120; Crocker *v.* United States, 240 U. S. 74, 78; United States *v.* Esnault-Pelterie, 299 U. S. 201, 206.

ment may be able to furnish evidence which it has failed to furnish during more than a decade of litigation, and especially in respect of a claim which at the bar the government frankly conceded to be inequitable.

The judgment should be reversed with directions to enter judgment for petitioner, without an allowance of interest upon the counterclaim, in accordance with the foregoing opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.